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PRIZE CASES

DECIDED IN THE

UNITED STATES SUPREME COURT

1789—1918

Including also cases on the instance side in which questions of Prize Law were involved

PREPARED IN THE DIVISION OF INTERNATIONAL LAW
OF THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE

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JAMES BROWN SCOTT
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PRIZE CASES DECIDED IN THE UNITED STATES SUPREME COURT, 1789-1918

The Grotius.—Sheafe, master.

(8 Cranch, 456) 1814.

Question as to the validity of capture; one man only having been put on board; the ship's papers and the navigation of the vessel being left to the master. Further proof ordered.

APPEAL from the sentence of the Circuit Court for the district of Massachusetts.

The *Grotius*, an American ship owned by Thomas Sheafe and Charles Coffin, the Claimants, sailed from Portsmouth, New Hampshire, March 2d, 1812, on a voyage, according to the shipping paper, from Portsmouth to one or more southern ports, and from thence to one or more ports in Europe, and back to her port of discharge in the United States, and to Portsmouth, if required. She arrived at New York, and sailed from thence with a cargo for St. Petersburg, and arrived at Cronstadt on the 17th of June, 1812. The cargo was owned by American merchants, and was consigned to a house at St. Petersburg. The consignees furnished a return cargo on the credit of the outward cargo. After the return cargo was put on board, the French armies having entered Russia and threatening to approach St. Petersburg, the consignees were apprehensive that their security for the return cargo might be lost. They arrested the ship and cargo, and would not permit her to | depart, but on condition p. 457
that she should proceed to London with the cargo then on board, and that the captain should sign bills of lading to deliver the property in London to the order of the consignees; they stipulating that if they should have obtained payment from the proceeds of the outward cargo, the bills of lading should be given up to their owners or agents in London, and the cargo then to be at the disposition of the captain.

The news of the war between the United States and Great Britain having reached St. Petersburg, the American ships in that port, (fifty or sixty in number,) with the knowledge and approbation of Mr. Adams, the American minister at the Court of St. Petersburg, sailed for England with British licenses. This was resorted to as the only course in which it was possible to get home. The Grotius sailed, among others, with such license. Owing to the lateness of the season, she put into Carlscrona, Sweden, where she lay from the 28th of November, 1812, until the 25th of March, 1813. On the 2d day of May following, she arrived at London,

and there discharged her cargo consisting of iron, hemp and cordage, and, on the 17th of June following, departed for the United States, in ballast. On the 29th of July, she was captured by the privateer *Frolic*, John O'Diorne commander, who put one man on board of her from the privateer. The captain of the Grotius kept his papers and the command of his ship, and navigated her to Boston. On her arrival, she was libelled in the district Court of Massachusetts.

In this Court a question was made by the Claimants, as to the fact of capture.

The master, in answer to the 2d interrogatory, swore that he never considered the ship Grotius to have been taken or seized as prize :—that he was present when an armed schooner under English colors met with her, the commander of which represented her to be a British privateer called the *Bream*, and requested him to take on board a man and treat him as a gentleman until he arrived in the United States, to which he consented.

Gilman, the mate, in answer to the 2d and 3d interrogatories, stated,
p. 458 that, until his arrival, he never knew | that the Grotius had been taken as prize ;—that the master had been ordered on board the schooner, and returned with *Very*, the man who had been taken on board the Grotius.

Chambers, a seaman, in answer to the 3d interrogatory, stated that the Grotius was met by an armed schooner under English colors which obliged the mate of the ship to go on board her, and afterwards sent him back with a man who, on the next day, declared himself to be put on board as prize-master, saying that if they should fall in with a French vessel, he should be obliged to shew his commission.

The affidavit of *Very*, the alleged prize-master, confirms the statement of the mate, that the captain was ordered on board the privateer, and that he, *Very*, was directed by his commander, in presence of the captain of the Grotius, to go on board as prize-master ; but that the master of the ship was to keep possession of the papers, and to navigate her into port.

In the district Court the ship was condemned to the United States. From this decree the captors and Claimants appealed.

In the Circuit Court the decree of the district Court was affirmed, *pro forma*, by consent of parties.

WEBSTER, *for the Claimants, contended*,

1. That, in this case, the ship was not captured, only one man having been put on board. That this case was not affected by the decision in the case of the *Alexander*. That a capture, as well as the bringing the vessel into port after the capture, must be the effect of power either actual or constructive. That the master of the ship did not know of the intention to capture, nor had he any idea that his vessel was captured,

until long after the alleged prize master was put on board. That there was no agreement to consider it as a capture. And, lastly, that there was no *bringing* in.

2. That the proceeding to London, under the circumstances of this case, was not such a trading with the | enemy as induced a forfeiture of p. 459
the ship. That it was an act justified by the necessity of the case, there being no other way to get the ship home. That the master was further justified in acting as he did, by the advice of Mr. Adams, the minister at St. Petersburg, where the ship was when the war was first known there. 1 *Rob.* 184, 220, *the Betty Cathcart.*

3. That the ship was not taken *in delicto*—that there was no trade with the enemy—that the master merely delivered the cargo in London —that the voyage was not to be considered as a continued voyage from the United States to Russia, from Russia to England, and from England to the United States, but merely as a voyage from Russia to London.

4. That the privateers of the United States had no authority, either under the prize act or their commissions, to capture American vessels found in circumstances like those of the Grotius; that is to say, bound directly to the United States, and within two or three days sail of her destined port. That if she was to be condemned at all, it must be as a *droit of admiralty*, not as prize to the captors. That privateers claim under a grant from the United States, and must be limited by the express terms of such grant, which ought to have a fair construction, and cannot be supposed to extend to cases where there is no risk, no trouble, no labor on the part of the captors. That the grant is to be considered as a reward for their services. That if a vessel is in port, either voluntarily or by stress of weather, she is no subject of capture.

PITMAN, *contra, for the captors.*

Contended, that the Grotius was liable to condemnation for having sailed from Russia to England with a British license, after knowledge of the war between Great Britain and the United States, and with contraband of war on board;—that the voyage was to be considered as one continued voyage from Russia to the United States;—that the vessel, therefore, if taken at any time before her arrival in the United States and in a place of safety, must be considered as captured *in delicto.* That the case was analogous to that of a vessel captured | while coming out p. 460
of a blockaded port into which she had previously slipped by stealth. 1 *Rob.* 126, 150, *the Vrow Judith.—id.* 72, 86, *the Frederick Molke.* That physical force was not necessary to constitute capture; that it had been so decided in the case of the *Alexander*; and that, if any doubt existed in the mind of the Court with regard to the capture, it was a case for further proof. That the privateers of the United States were authorized to capture even within the jurisdiction of the United States.

DEXTER, *in reply*,

Urged that although the master of the Grotius had heard of the war, he had also heard of the repeal of the orders in council, and that an armistice was about to be agreed upon, if it had not already taken place; that, therefore, it was as if they had not heard of the war at all. That, in order to subject a vessel to condemnation, she must be captured in the prosecution of the voyage in which she was guilty of the offence: that the Grotius was not captured on that voyage: that the voyage from Russia to England was to be considered as a distinct voyage, after the completion of which the vessel was not liable to condemnation for any offence committed on that voyage. That even if the proceeds of the cargo previously deposited in England had been on board at the time of the capture, it would have been no cause of condemnation. That when the cargo was deposited, the offence was deposited with it. *Park.* 239, *Amer. Ed.* 1 *Rob.* 193, 230, *the Rebeckah, note.* 2 *Br. Civ. Law*, 58.—*id.* 250.—*id.* 262.

Wednesday, March 16th. Absent....MARSHALL, *Ch. J.*

WASHINGTON, *J.*, delivered the opinion of the Court in this case, as follows:

This case differs in no material respect from that of the *Joseph*, just decided, except that in this a question arises as to the validity of the capture. The master of the *Grotius*, in answer to the second standing interrogatory, swears that he hath never considered the ship to have been taken or seized as prize. That he was present when an armed schooner under English colors met with her, the commander of which
p. 461 represented her | to be a British privateer called the *Bream*, and requested him to take on board a man, and treat him as a gentleman until he arrived in the United States; to which he consented. This testimony of the captain is confirmed by Gilman, the mate, in answer to the 2d and 3d interrogatories, who adds, that *Very*, the man who was put on board, never conducted as prize master, nor in any other manner than a passenger would, during the voyage. *Pierce*, one of the seamen, who accompanied the captain on board the schooner, swears that he never knew the ship was seized as prize until after her arrival within the Boston light-house. *Chambers*, another seaman belonging to the Grotius, in answer to the third interrogatory, says that she was met by an armed schooner under English colors which obliged the mate of the ship to go on board her, and afterwards sent him back with a man who, on the next day, declared himself to be put on board as prize-master, saying that if she should fall in with a French vessel, he should be obliged to show his commission. That he knows not upon what pretence or for

what reason she was taken, not knowing, in fact, that she was made prize of, until her arrival at Boston.

Daniel J. Very, the alleged prize master, has deposed, on oath, that he was present at the capture of the Grotius by the Frolic; that the captain of the ship was ordered on board the schooner with his papers; and that he, *Very*, was directed by his commander to go on board as prize master, and this in the presence of the captain of the Grotius; that the master of the ship was to keep possession of the papers, and to navigate her into port. That he accordingly went on board as prize master, carrying with him a copy of the commission of the Frolic; and instructions, in writing, from the commander to him (*Very*) as prize-master. That the captain of the Grotius informed his crew that in case a British cruizer should board the Grotius, and they should be asked respecting the said *Very*, they were to answer that he was a passenger.

Without giving any opinion as to the regularity of admitting the affidavit of the prize master as a part of the preparatory evidence, the Court is of opinion that the facts necessary for deciding upon the validity of the | capture, are not sufficiently clear; and that it will be proper to p. 462
make an order for further proof, to be furnished by the captors and the Claimants, with respect to all the circumstances of the capture.

This point appears not to have been made or considered in the Court below.

The Brig Short Staple and Cargo (Hallaway and others, claimants) v. The United States.

(9 Cranch, 55) 1815.

Quere? Whether, under the 1st and 2d embargo laws of 1807 and 1808, a registered vessel which had a clearance from one port to another of the U. States was liable to condemnation for going to a foreign port.

If a vessel be captured by a superior force and a prize-master and a small force be put on board, it is not the duty of the master & crew of the captured vessel to attempt to rescue her—for they may thereby expose the vessel to condemnation although otherwise innocent.

Feb. 13th. *Absent*....JOHNSON, *J.* & TODD, *J.*

THIS was an appeal from the sentence of the Circuit Court, for the district of Massachusetts, which affirmed that of the district Court condemning the brig Short Staple and cargo.

The facts of the case are thus stated by the Chief Justice in delivering the opinion of the Court.

This vessel was libelled in the district Court of Massachusetts, in March, 1809, for having violated the embargo | laws of the United States, p. 56
by sailing to a foreign port. The fact is admitted by the Claimants, who

allege, in justification of it, that the vessel was captured, while on her voyage to Boston, by a British armed vessel, and carried into St. Nichola Mole, where the government of the place seized the cargo.

It appeared in evidence that the Short Staple sailed from Boston, about the 10th of October, 1808, with instructions to procure a cargo of flour, and return therewith to Boston, unless the embargo should be removed before the commencement of her return voyage, in which case she was directed to proceed to the island of Gaudaloupe. At Baltimore she took on board a cargo of flour, and sailed thence for Boston, about the 28th of October. She was detained, several days, in Hampton Roads, by contrary winds. During this detention, the British armed vessel Ino put into Hampton Roads for the purpose of repairing some damage sustained in a storm on the coast. The Ino had been in the port of Boston while the Short Staple lay there, and had cleared out for the Cape of Good Hope, though her real destination was Jamaica. The reason her captain has since assigned for this imposition, was that by clearing out for the Cape of Good Hope, he was allowed to take on board a larger supply of provisions than would have been allowed, had he cleared out for any port in the West Indies.

As soon as the wind was favorable, the Short Staple, together with another vessel, likewise bound from Baltimore to Boston, called the William King, put to sea, and was followed by the Ino, who soon overtook them, and took possession of them both as prize, alleging that they were bound to a French Island. The captor put a prize-master and two hands on board the Short Staple, and sailed in company with them until they fell in with a British ship of war. The captain of the Ino directed the prize-master to meet the ship of war, and submit to her orders; while the Ino, dreading that her hands might be impressed, made sail to the windward and escaped. After their papers had been examined, the Short Staple and the William King were permitted to proceed on their voyage, and were carried into St. Nichola Mole, the place appointed by
p. 57 the captain of the Ino for | meeting them when he was separated from them by the ship of war. They arrived at the Mole about two days after parting from the Ino, who followed them, and entered the port soon after them. The government of the place insisted on detaining one of the vessels, as provisions were scarce at the Mole, and the Short Staple was given up to them. Her cargo was landed under the direction of the government, and purchased at about $32 per barrel. Having received about $1,200 in part pay for the cargo, the captain of the Short Staple sailed to Turk's Island, and loaded her with a cargo of salt, with which he returned to a port in Massachusetts, where his vessel was seized as having violated the embargo laws. The William King appears to have been carried to Jamaica, and there liberated without having been libelled.

The Short Staple was condemned in both the District and Circuit Courts, and the case is brought before this Court by writ of error.

P. B. KEY & R. G. AMORY, *for the Appellants*, contended,

1. That no law prohibited the Short Staple from going to the West Indies; and

2. That she was carried there by the superior force of a British vessel of war.

1. There was no law then in force by which the brig could be condemned for going to a foreign port.

The only embargo laws then in force which could affect this vessel were the original embargo act of 22d Dec. 1807, (*vol.* 9, *p.* 7,) and the supplementary act of 9th of January, 1808—*vol.* 9. *p.* 10.

The first act laid 'an *embargo* on all ships and vessels bound to any foreign port or place,' and directed that no clearance should be granted for any foreign voyage; and that no *registered* or *sea-letter* vessel, having on board a cargo, should be allowed to depart from one port of the United States to another port of the United States, unless the master, &c., should give bond in double the value of vessel and cargo, that the cargo should be re-landed in the United States. The act did not | give p. 58
any forfeiture. The *first* section of the 2d embargo law (the supplementary act of January 9th, 1808,) relates only to vessels '*licensed for the coasting trade.*'

The 2d section relates only to vessels licensed for the *fisheries* or *whaling* voyages.

The 3d section enacts, that 'if any vessel' 'shall, *contrary to the provisions of this act, or of the act to which this is a supplement,*' 'proceed to a foreign port or place,' 'such vessel shall be wholly forfeited.'

If any forfeiture is given it must be by this section—and this section applies only to such vessels as shall violate the provisions of this or the former act. The 'provisions of *this* act' do not apply to a *registered* vessel, but only to licensed *coasters* and *fishing vessels.* The first embargo law did not *forbid* a vessel to sail to a foreign port if she should have a clearance but relied upon the bond and security that the cargo should be relanded. It was the violation of a *contract* not an offence against law. It was a breach of the condition of the bond, but no crime. Every man has a right to refuse to comply with the condition of his bond if he will pay the penalty. The United States, in the present instance, *did* resort to the bond. It is true they did not recover, because the jury found a verdict against them upon the issue of fact. But they have had their remedy.

A registered vessel could only violate the provisions of the first or second embargo law, by going to a foreign port *without a clearance*; or by going to a port of the United States *without giving bond.* A vessel

which had a clearance and had given the bond was not forbidden to go to a foreign port. The *Short Staple* had a clearance and had given the bond. The provisions of the supplementary act could only be violated by licensed coasters and fishing vessels, and are not applicable to the present case. The vessel did not go to a foreign port contrary to the provisions of the act, but contrary to the condition of the bond.

JONES, *contra.*

The only questions are whether the 3d section of the 2d embargo law
p. 59 superadds the forfeiture of the vessel | to the penalty of the bond, for violation of the previous law, or whether it provides a forfeiture for the violation of a new prohibition.

The expression 'contrary to the provisions of this act or of the act to which this is a supplement,' mean contrary to the spirit and intention of those acts. The spirit of the former act was unquestionably a prohibition of all foreign trade. To go with a cargo to a foreign port was clearly against the spirit of the embargo. A vessel violates the provisions of the act when she violates the bond which the act provides. The act declares that an embargo shall be laid on all vessels bound to a foreign port. The word *embargo* is equivalent to a prohibition. And the words 'bound to a foreign port' mean a vessel *intending* to go to a foreign port—not merely a vessel *ostensibly bound* to such port.

But if the vessel, by violating the bond does not violate the law which requires the bond, yet the third section of the second embargo act creates a new offence, viz. that of going to a foreign port. It is coupled, in the same sentence, with the prohibition to put foreign goods on board of another vessel, which is unquestionably an entirely new offence, and yet, according to the words of the act, must be done contrary to the provisions of this or the former act. This shows that the legislature did not mean to confine the forfeiture to violations of the first act, or of the two first sections of the second act.

AMORY, *in reply,*

Observed that the word *embargo* meant a restraint, or confinement of vessels already *in port,* and could not affect the conduct of a vessel after she had left the port. If she has a license to leave the port, the embargo, as such, cannot make her subsequent conduct unlawful.

*February 17th. Absent....*JOHNSON, *J. and* TODD, *J.*

MARSHALL, *Ch. J.* after stating the facts of the case, delivered the opinion of the Court as follows:

It has been contended by the Plaintiffs in error, |
p. 60 1. That the Short Staple being a registered vessel, and having given bond as required by law for re-landing her cargo in the United States, is not liable to forfeiture, if she has violated the condition of that bond.

2. That her sailing to a foreign port, being under the coercion of a force she was unable to resist, is justifiable under the laws of the United States.

The first error has been pressed with great earnestness by the counsel for the Plaintiffs; but the Court is not convinced that his exposition of the embargo acts is a sound one. On this point, however, it will be unnecessary to give an opinion; because we think the necessity under which the Claimants justify their going into St. Nichola Mole, is sustained by the proofs in the cause.

It is not denied that a real capture and carrying into port by a force not to be resisted, will justify an act which, if voluntary, would be a breach of the laws imposing an embargo. Nor is it denied that if such capture be pretended, if it be made with the consent and connivance of the parties interested, such fraudulent capture can be no mitigation of the offence. The whole question, then, to be decided by the Court, is a question of fact. Was this capture real—was the force such as the Short Staple could not resist? or was it made in consequence of some secret arrangements between the captor and captured?

It is contended, on the part of the United States, that the circumstances of this case are such as to outweigh all the positive testimony in the cause, and to prove, in opposition to it, that the Short Staple was carried into St. Nichola Mole, not by force, but with her consent, and by previous concert between her owners and the captain of the Ino.

Those circumstances are,

1. The arrival and continuance of the Ino in the port of Boston, while the Short Staple lay in that port previous to her departure for Baltimore. |

2. Her clearing out for the Cape of Good Hope while her real desti- p. 61
nation was Jamaica.

3. The continuance of the Short Staple in Hampton Roads until the arrival of the Ino.

4. Her capture on a coasting voyage which would not justify suspicion.

5. Her being carried to a port where there was a good market, and there given up; and,

6. That the William King, when carried to Jamaica, was also given up without being libelled.

That these circumstances are some of them such as to justify strong suspicion, and such as to require clear explanatory evidence to do away their influence, is unquestionable. But the Court cannot admit that any or all of them together amount to such conclusive evidence as to render it impossible to sustain the defence.

That the Ino should arrive in the port of Boston while the Short

Staple lay in that port is nothing remarkable. It furnished an opportunity of concerting any future plan of operations with the owners of the Short Staple, or of any other vessel; but is certainly no proof of such concert. There is no evidence that the respective owners were acquainted or had any communication with each other; and the whole testimony is positive that no such communication took place.

That the Ino should have cleared out for the Cape of Good Hope, when her real destination was Jamaica, is sufficiently accounted for. It enabled her to take on board a considerable quantity of provisions, an article in demand in Jamaica, which she would not have been permitted to do had her real destination been known. This may be a fraud in the Ino, but cannot affect the Short Staple.

That the Ino should have arrived in Hampton Roads while the Short Staple remained there, and should have followed her to sea, and have captured her, are unquestionably circumstances which justify strong
p. 62 suspicion, | and which would be sufficient for the condemnation of the vessel, if not satisfactorily explained: but it is not conceded by the Court that they admit of no explanation. These circumstances are not absolutely incompatible with innocence.

It is proved by testimony to which there is no exception, and which no attempt has been made to discredit, that the Short Staple was absolutely wind-bound the whole time she remained in Hampton Roads; and that she attempted to put to sea before the arrival of the *Ino*, but could not. Had this capture ever been pre-concerted in Boston, the Ino and Short Staple would more probably have contrived to meet on the return voyage of the latter, than to have adopted the course of the one waiting in port for the arrival of the other, and then sailing out almost together.

The arrival of the Ino in Hampton Roads is completely accounted for. She had suffered by the perils of the sea, and put in for necessary repairs. This fact is proved positively, and no opposing testimony is produced.

That the Ino should have pursued the Short Staple on a coasting voyage, and have captured her, was a wrong not to be justified. It is said to have been so atrocious a tort, that its reality is incredible. The fact, however, is completely proved. The master of the Short Staple swears that he was on his voyage to Boston; that his intention was to proceed to that port; that he had had no previous communication with the Ino, and had no expectation of being captured by her, or of being turned out of his course. The other persons on board the Short Staple testify to the same facts, as far as their knowledge extends. The owner of the Ino, who was on board, and her officers, swear that they had no previous communication with the Short Staple or her owner; that there

was no concert of any sort between them; that they were informed by some person on shore, while the Ino lay in Hampton Roads for repairs, that the Short Staple and the William King were on a voyage to a French island; that expecting to find something which would justify condemnation as prize, they determined to examine those vessels, and, | although, on examination, they found nothing to justify capture, they p. 63 still hoped that something would appear in future; and that, at the worst, they should incur no risk of damages, because they should carry the vessels and cargoes to a good market. In this confidence, they determined to take them to Jamaica.

This disposition in the captors, however indefensible, is very probable. It grew out of the state of the two countries; and no individual who was captured in consequence of it ought, if his own conduct contributed in no degree to that capture, to be made the victim of it.

That she was carried into St. Nichola Mole, and there given up to the government of the place, is, in itself, a circumstance throwing some suspicion on the transaction, and requiring explanation. The testimony explains it. The Ino was separated from her two prizes by a fact which is fully proved, and which sufficiently accounts for that separation. That her captain should, when about to leave them, appoint some near port as the place of meeting again, was almost of course; and that he should have relinquished one of the vessels to the government of the place ceases to be matter of much surprize when it is recollected that he could not have much expectation of making her a prize; that, in fact, the capture was made with scarcely any hope of condemnation, but with a certainty that it would produce some additional supply of provisions, and could injure no person. The criminality of this mode of thinking, whatever it might be, was not imputable to the owners of the Short Staple.

It has been contended that, during the separation of the Ino from the captured vessels, a rescue ought to have been attempted. There having been, during that period, but three persons belonging to the Ino on board the Short Staple, they might have been overpowered by the American crew; but the attempt to take the vessel from them was no part of the duty of the Americans, and might, in the event of re-capture, have exposed the vessel and cargo to the danger of condemnation, of which, without such rescue, they incurred no hazard.

The abandonment of the William King without libelling | her, is the p. 64 natural consequence of having been able to find no circumstances of suspicion which might tempt the captors to proceed against her. It undoubtedly proves, what the captain of the Ino avows, that he acted under a full conviction of being exposed to no risk by the capture, though he should reap no advantage from it.

The interest which coasting vessels had in fictitious or concerted captures, undoubtedly subjects all captures to a rigid scrutiny, and exposes them to much suspicion. The case of the Claimant ought to be completely made out. No exculpatory testimony, the existence of which is to be supposed from the nature of the transaction, ought to be omitted. The absence of such testimony, if not fully accounted for, would make an impression extremely unfavorable to the claim. But where the testimony is full, complete and concurrent; where every circumstance is explained and accounted for in a reasonable manner; where the testimony to the innocence of the owners and crew of the vessel is positive, proceeding from every person who can be supposed to have any knowledge of the facts, and contradicted by none; the Court cannot pronounce against it. This would be to allow to suspicious circumstances a controling influence to which they are not entitled.

The sentence of the Circuit Court, condemning the Short Staple, is reversed and annulled, and the cause remanded to that Court with directions to decree a restoration of the vessel to the Claimants, and to dismiss the libel.

STORY, *J.* stated that he dissented from the opinion of the Court and adhered to the opinion which he gave in the Court below, in which he had the concurrence of one of his brethren.

The St. Lawrence.—Webb, master (M'Gregor and Penniman claimants).

(9 Cranch, 120) 1815.

If, upon the breaking out of a war with this country, our citizens have a right to withdraw their property from the enemy's country, it must be done within a reasonable time. Eleven months after the declaration of war is too late.

*February 23rd. Absent....*TODD, *J.*

APPEAL from the sentence of the Circuit Court for the District of New Hampshire, condemning the ship St. Lawrence and cargo. All the claims in this case, except those of *M'Gregor* and *Penniman* for certain parts of the cargo, were settled at the last term, and with regard to these further proof was ordered.

No further proof having been produced, the case was submitted to the Court without argument.

*February 25th. Absent....*TODD, *J.*

STORY, *J.* delivered the opinion of the Court as follows: |

p. 121 The only claims in this case now remaining for the consideration of the Court, are those of Mr. Penniman and M'Gregor. Further proof was

directed, at the last term, to be made in respect to those claims ; and no additional evidence having been produced, beyond that which was then disclosed to the Court, the causes have been submitted for a final decision.

In respect to the claim of Mr. Penniman, the evidence is very strong that the goods were purchased some time before the war, by his agent in Great Britain, on his sole account. They were not, however, shipped for the United States until the latter part of May, 1813.

It is not the intention of the Court to express any opinion as to the right of an American citizen, on the breaking out of hostilities, to withdraw his property purchased before the war, from an enemy country. Admitting such right to exist, it is necessary that it should be exercised with due diligence, and within a reasonable time after the knowledge of hostilities. To admit a citizen to withdraw property from an enemy country, a long time after the war, under the pretence of its having been purchased before the war, would lead to the most injurious consequences, and hold out strong temptations to every species of fraudulent and illegal traffic with the enemy. To such an unlimited extent we are all satisfied that the right cannot exist. The present shipment was not made until more than eleven months had elapsed after war was declared ; and we are all of opinion that it was then too late for the party to make the shipment, so as to exempt him from the penalty attached to an illegal traffic with the enemy. The consequence is, that the property of Mr. Penniman must be condemned.

And this decision is fatal, also, to the claim of Mr. M'Gregor. Independent, indeed, of this principle, there are many circumstances in the case unfavorable to the latter gentleman. In the first place, it is not pretended that the goods included in his claim were purchased before the war. In the next place, he was the projector of the present voyage, and became, as to one moiety, the charterer or purchaser of the ship. | Nearly p. 122
all the cargo consisted of goods belonging (as it must now be deemed) exclusively to British merchants. He was, therefore, engaged in an illegal traffic of the most noxious nature ; a traffic not only prohibited by the law of war, but by the municipal regulations of his adopted country. His whole property, therefore, embarked in such an enterprize, must alike be infected with the taint of forfeiture.

The judgment of the Circuit Court must, therefore, as to these claims, be affirmed with costs.

The Mary.—Stafford, master.

(9 Cranch, 126) 1815.

The condemnation of a vessel as enemy's property, for want of a claim, cannot prejudice the claim for her cargo; but it is still competent for the Claimant of the cargo to controvert the fact that the vessel was enemy's property, so far as that fact could prejudice his claim.

One Claimant cannot be injured by the contumacy of another.

The holder of a bottomry bond cannot claim in a Court of prize. An American vessel sailing from England in Aug. 1812, in consequence of the repeal of the British orders in council, and compelled by dangers of the seas to put into Ireland, where she was necessarily detained until April, 1813, when she sailed again for the United States, under the protection of a British license, being captured on the voyage by an American privateer, was protected by the president's instructions of the 28th of Aug. 1812. The continuity of the voyage was not broken.

*February 20th. Absent....*TODD, *J.*

APPEAL from the sentence of the Circuit Court for the district of Rhode Island, condemning the cargo of the Mary, as prize to the privateer *Paul Jones.*

This cause was argued at last term by STOCKTON and PINKNEY for the Claimants, and J. WOODWARD for the Captors, (8 Cranch, 388,) when leave was given by this Court, for further proof, by affidavits, on the following points.

1. As to the citizenship of N. J. Visscher.

2. As to the names of the other heirs of general Fisher, who are interested in the property; the place of their residence, and their national character.

3. As to the time when N. J. Visscher, went to England; the object he had in view in going thither; how long he resided there; when the cargo was purchased; and when he returned to the United States.

4. As to the instructions which the Paul Jones had on board at the time of the capture of the Mary; and particularly whether the president's instruction of the 28th of August, 1812, had been delivered to the captain, or had come to his knowledge, at the time of the capture; or whether the Paul Jones had been in port, after the 28th of August, 1812, and before the capture.

The captors also had leave to make further proof as to the same points.

The further proof now offered consisted of the affidavits of the Claimant, N. J. Visscher, Jacob S. Pruyn, and David Gelston, collector of the customs for the port of New York. The affidavit of N. J. Visscher stated, in substance, that he, and sundry other persons, (whose names and places of residence are mentioned, and who are all citizens and
p. 127 residents of the United States,) are | the sole heirs at law and personal representatives of the late general Garret Fisher, who died in London

intestate. That he, in behalf of himself and as agent for the other heirs, went to England, (having first obtained leave from the war department, he being a military officer in the service of the United States,) in consequence of an agreement between him and the other heirs, dated June 19th, 1811, (which original agreement is annexed to the affidavit.) He arrived in England on the 22d of August, 1811, and obtained letters of administration on the estate of general Fisher, collected the effects, converted them into cash, paid the debts, and was prepared to remit the balance to the United States long before the war was known in England; and was waiting for a favorable opportunity of investing the same in property that could be advantageously sent to the United States, the balance of exchange being then greatly against him, and not being able to invest the whole in United States' stock. That as soon as the revocation of the English orders in council took place, supposing that it would be followed by the repeal of the non-importation law of the United States, he gave orders for the purchase of British goods to nearly the whole amount of the balance remaining in his hands, which purchase, including the goods now in question, was made by Harman Visger, his agent, *before the war was known in England*, who caused them to be sent to Bristol to be shipped, where they arrived in July and August; whence they were shipped early in August on board the American brig Mary. That the goods were the sole property of the Claimant, for himself and the other heirs of general Fisher. That he left England as soon as his business was settled, and arrived in the United States, on the 19th of October, 1812.

The affidavit of Mr. Pruyn confirms that of Mr. Visscher, as to the residence and citizenship of the Claimant and the others interested in the cargo.

The affidavit of Mr. Gelston states the fact that a copy of the president's instruction of the 28th of August, 1812, was given to the commander of the *Paul Jones*, before she sailed on the cruize in which she captured the Mary.

No further proof was offered on the part of the Captors. | p. 128

STOCKTON, *for the Claimant*,

After reading the further proof offered by the Claimant, said he should rest the case, in the opening, upon the argument formerly made.

J. WOODWARD, *for the Captors*,

Was directed by the Court to show wherein this case differs from that of the *Thomas Gibbons*, decided at last term, upon the effect of the president's instruction of the 28th of August, 1812.

WOODWARD. The *Thomas Gibbons* was an American vessel and sailed so early as to be presumed to have sailed in consequence of the repeal of the orders in council. But we contend that the Mary, sailing from Ireland, under a British license, as late as April, 1813, (which license was obtained

for the vessel and cargo, by a British subject in his own name,) and laden with British goods, must be taken to be a British vessel, and not as sailing in consequence of the repeal of the British orders in council, within the meaning of the instruction of the 28th of August. But the fact that the vessel has not been claimed, is clear proof that she was British.

The voyage from Ireland in April, 1813, *as far as respects those instructions*, is a voyage *de novo*, whatever it may be considered to be upon more general principles of law.

The intent of these instructions was to protect American vessels and their cargoes, sailing from England under the impression that the repeal of the orders in council would have been followed by a repeal of our non-importation law, and a cessation of hostilities; but not to protect vessels sailing with a full knowledge that those consequences had not, and probably would not follow the repeal of the orders in council. At the time the Mary sailed all such expectations had ceased. The instructions are derogatory to the rights of war, and the party wishing to protect himself thereby must bring himself strictly within their meaning and intent. The vessel and cargo were safe at Waterford, and the political
p. 129 relation between the two countries was then well understood, | there was no necessity of her sailing from thence; she knew that the war was raging with increased violence.

The new license although it refers to the old one bears a very different character. The old one was innocent because it was not then the license of a belligerent, and did not give a belligerent character to what it protected; but the new had all the characters of a belligerent license, notwithstanding its connexion with the old. When she sailed, she knew, or might have known, and taken warning by the act of congress of the 2d of January, 1813, which extends the protection of the instructions only to vessels sailing before the 15th of September, 1812. The instructions merge in, or are controled by the provisions of that act. A vessel could not be protected by the instructions unless she sailed not only in consequence of the repeal of the orders in council, but before the 15th of September, 1812.

The necessity for a new license shews that it was a new voyage. She was obliged to take new papers and a new clearance. But if a voyage be legal in its commencement, and before it be finished, become illegal, and the party has an opportunity to put an end to it, he is bound to do so. The prosecution of the voyage, after a knowledge of its illegality, and after an opportunity given to abandon it, must be considered as placing the party *in delicto*.

If this property was purchased after knowledge of the war had reached England, it is liable to condemnation. The invoices are dated the 13th of August, and the war was known in Liverpool on the 18th of July. By the

order for further proof the Claimant is called upon to prove *the time when* the cargo was purchased. No such proof is offered. The affidavit of Mr. Visscher, if it could be considered as *proof*, does not state the time, but merely states in general terms that the purchase was made before the war was known in England. This is not such *proof* as the order requires. The proof of the fact if it exist, is in England, why has it not been obtained? It is the most material fact in the case. The voluntary affidavit of the party himself, who is so deeply interested in the cause cannot be evidence. At the last term | the Court wanted further evidence p. 130
of that fact. They have not obtained it, nor is it shown that it was out of the power of the Claimant to produce it. It was in his power. But it was not in our power to produce evidence of the contrary. It is not probable that the witnesses would have consented to a voluntary examination on our part and we had no means to compel them to testify. We rely upon this defect of evidence.

EMMETT, *on the same side.*

The condemnation of the *vessel*, is final and conclusive, there being no appeal. Part of the cargo is in the same condition: 160 bundles of steel, worth about 1000 dollars, are unclaimed and of course no appeal was taken and they belong to the Libellants. N. J. Visscher filed two claims, and therefore had time to rectify the mistake if any were made.

It is clear therefore that there were articles on board which did not belong to N. J. Visscher, and that he intended to disclaim certain parts of the cargo.

This case is not within the reason of the decision in the case of the *Thomas Gibbons*. The intention of the instructions was to exempt the property from capture, not to give it an entire immunity. This could be done only by the legislative power. The object of the instructions was to suspend the prize act in this particular until the legislature could interfere. In the case of the Thomas Gibbons, this Court, in delivering its opinion has connected the instructions with the act of congress of 2d January, 1813, and seems to hold out the idea that the time of sailing of a vessel must be limited to the 15th of September, in order to be protected by the instructions. The act of congress had made that definite which the instructions had left undefined. If the instructions and the act are not thus to be connected and construed together, there is no time limited, and a vessel may at any period of the war be protected by those instructions.

Does this vessel come within those instructions? Is she a vessel owned by citizens of the United States? She has been condemned as enemy's property. From that sentence there has been no appeal. It is conclusive. |

But although that objection seems conclusive, yet there is a still p. 131

stronger ground of condemnation. She did not sail from Waterford until nine months after war was declared. Here was ample time for countermanding her voyage after knowing that the repeal of the orders in council would not produce a cessation of hostilities. Can such a case be protected by the instructions.

The further proof furnishes irresistable evidence of trading with the enemy. The order for further proof calls for evidence of the national character of Visscher, and those interested with him in the claim, and of the *time when the goods were purchased*, as well as with regard to the question whether the instructions were on board the privateer. It is clear therefore that the Court were not *then* satisfied as to any of those points.

No further competent evidence has been produced as to the *time* of purchase. The Court will not receive as proof the affidavit of the interested party himself, when it is clear that better evidence must have been in his power. Why did he not produce the affidavit of his agent who made the purchases, or the bills of parcels, which he must have in his possession, by which to settle with the other heirs. These bills of parcels also would have shown whether other parts of the cargo as well as the 160 bundles of steel, did not belong to Harman Visger.

But this was a clear case of trading. Visscher was only to collect and remit the proceeds of the estate. Instead of which he goes to trading with it for his own benefit, not that of the heirs. By undertaking to ship goods he took the risk on himself, and if lost, he must account to the other heirs.

It is immaterial, however, whether the goods were purchased before or after knowledge of the war. 8 *T. R.* 556, the case of *St. Philip* cited in *Potts & Bell*, from the MS. notes of *sir E. Simpson.*

LIVINGSTON, *J.* Was not this point settled in the case of the Rapid ?

p. 132 EMMETT. I think it was; but lest it should not | have been, I refer the Court to the case of the *Juffrow Louisa Margaretha.* 1 *Rob.* 170, (*Amer. Ed.*) cited in the case of *the Hoop.*—1 *Rob.* 177, *The Eenigheid.*—1 *Rob.* 178, *The Fortuna.*—1 *Rob.* 181, *sir William Scott's judgment in the Hoop*, where he does not allow an excuse either of convenience or necessity. A license from the government of the United States ought to have been obtained for the *Mary*, or the voyage abandoned. 1 *Rob.* 180, *The William.*

A distinction is attempted to be taken between this case and that of the *Rapid.* It is said this vessel was *in motion.*

If a vessel has been in motion so far that there is no opportunity of countermanding the voyage, this distinction might be relied upon. But here there was time for countermanding. Upon this point see again the case of the *Fortuna.* When was the Mary in motion ? War was published in London on the 26th of July. This vessel did not begin to load till

August, and did not sail from Bristol till three weeks after knowledge of the war. N. J. Visscher himself was present and might have countermanded the voyage, which is a circumstance of great importance. 5 *Rob.* 142, (*Eng. Ed.*) *Juffrow Catharina.*

STORY, *J.* The case of the Rapid differs from this. She went from this country to that of the enemy after knowledge of the war.

EMMETT. As to the Rapid, the condemnation was owing to the presence of Harrison, who might have countermanded the voyage, but did not. Whether the party be in the country at the time of the breaking out of the war, or goes there afterward is immaterial; in each case he is equally bound to countermand the voyage. The present case therefore is precisely that of the *Rapid.*

But N. J. Visscher was in England long after the Mary put into Waterford. He did not leave England till the 7th of September; the Mary arrived at Waterford in August. He knew that the vessel must remain there till the spring, and that she could not arrive in the United | States until nearly a year after the declaration of war. Why did he not p. 133
apply to the United States for a license?

The sailing from Waterford was a new voyage. We are to consider the transaction, not in a commercial point of view, but as it is affected by public policy and national law. To every belligerent purpose it was a voyage *de novo.* It is not protected by the act of congress of 2d January, 1813. That act requires that the vessel should have sailed before the 15th of September, 1812, and should have sailed in consequence of the repeal of the orders in council. The act has no *prospective* view. Visscher knew that it did not protect this vessel. He traded at his peril. 1 *Rob.* 181, *The Hoop.*

But if, contrary to expectations, this property should be restored we trust it will be with costs. There was no proof of property on board. She was found sailing with a British license dated long after the war was known. She had sailed long after the 15th of September, and did not appear by any documents on board to be within the president's instructions of the 28th of August, 1812. It is not usual to give costs after an order for further proof. If the papers withheld, had been produced it is probable a great deal more of the property would be found to belong to Harman Visger.

PINKNEY, *in reply.*

It is said that Mr. Visscher has been trading for his own benefit, upon the funds he received. There is no foundation for such an assertion. The letters of Harman Visger, and all the documents show that the goods were purchased and shipped for the joint benefit of all the heirs. He did the best for the interest of all concerned, according to his judgment, and agreeably to the agreement of the parties, which contemplates and

provides for the case of his being obliged to remit goods, and binds him to cause them to be insured.

Two questions arise in this case,

1. Was the Mary the property of an American citizen ? |

p. 134 2. If so, was she, when captured, sailing in consequence of the repeal of the British orders in council ?

1. Was the Mary the property of an American citizen ?

All the documentary evidence shews that she was.

But it is contended that she was the property of one *Smith* a Scotsman, and this assertion depends upon the evidence of the *cook*, who says he believed it because Smith ordered the men about. But it appears that this cook was shipped just as the vessel sailed.

It is said also that the ship, not having been claimed, was condemned, and no appeal has been prayed, which shows conclusively that she was British property.

The reason why she was not claimed appears in the evidence. She was hypothecated for more than she was worth. If lost by capture the owner is not personally liable, but if he should claim, and the vessel should be restored, he would be liable for the amount of the bottomry bond. Visscher, who held the bond, could not claim in his own name, for it has been decided that such a lien on the ship will not support a claim, and he could not use the name of the owner without his consent, which he would certainly not give to impose a liability on himself. It was his interest to make it a total loss. A sentence of condemnation founded upon the want of claim accounted for in such a manner, cannot surely be conclusive evidence that the ship was not bona fide owned by an American citizen.

2. Was she sailing in consequence of the repeal of the orders in council ?

This voyage unquestionably had its inception in consequence of that repeal. We think this case falls precisely within the principles decided in that of the *Thomas Gibbons*. But it is said that the deviation to Waterford makes it a new voyage. That this was a continuation of the voyage *at the common law*, is admitted ; but not *in a Court of prize*. Why should there, in this respect, be a difference between the law merchant

p. 135 and the law of | nations ? We contend that the law of nations, being more enlarged, is less rigid than the law merchant.

But as to prize law, the English Courts of prize always connect voyages of this kind. *Continuity* is the favorite doctrine of a prize Court. The British Courts of prize, on the subject of contraband of war, seem to have been enamored of this doctrine of continuity ; they condemn vessels returning with the proceeds of contraband ; thereby making the homeward voyage the outward voyage, and the proceeds of contraband the contraband itself.

But it is said that this vessel was bound on an illegal voyage, and

therefore cannot plead distress. She acted on the belief that the repeal of the orders in council would produce peace, as all others did, and if she was in error, *communis error facit jus.*

The president's instructions and the act of congress go on the ground that this error was excusable.

This vessel is within the benefit of the maxim *actus Dei nemini facit injuriam.* She would certainly have been protected by that maxim, if she had been all that time driven about the Atlantic by storms and contrary winds; and her case is still the same; she was still *in itinere.* It is said that the instructions were a substitute for a legislative act, and that the act of congress has superceded the instructions. This we do not admit. They may both stand together—their objects are different.

But we are referred to the policy of the instructions and it is said that this vessel was not within that policy. The adventure was undertaken in the belief that the war would cease; the going to Waterford and the detention there were necessary to the prosecution of the voyage.

But it is said there was *locus penitentiæ.* That Visscher knew how long the vessel would be detained there, and therefore ought to have abandoned the voyage. There is no evidence of that fact if it were material. But if he did know it, he knew also that the voyage was innocent in its inception, and that its continuity could not be broken by this necessary deviation. |

As to his obtaining a second British license, it was necessary; he p. 136
could not leave Waterford without it. It was not a voluntary act. He acted under a *vis major.* The second license was only a renewal of the first; if he had authority to go at all, he might lawfully use the means. After his return to the United States, he did not apply for an American license because he was daily expecting the arrival of the Mary; besides he knew that she was protected by the president's instructions.

The opposite argument is raised upon the supposition that she must not only *commence* her voyage under an impression that war had ceased, but must continue under the same impression during the whole voyage. Must she return, if, in the midst of the Atlantic, she is undeceived?

The voyage was commenced under a belief that war had ceased, and was continued under the impression that she would be protected by the instructions of the president. Although there was war between the United States and Great Britain, yet there was peace between the United States and this adventure. This case, in principle, is exactly that of the *Thomas Gibbons.*

But we are accused of not having produced sufficient further proof of the proprietary interest in the cargo and the time of purchase. They say the only evidence is the affidavit of N. J. Visscher—*testis in propria causa.* Such testimony is, and always must be admitted in prize causes.

N. J. Visscher is a man of fair character. But his testimony was matter of supererogation. Every document and paper showed before that the property was American.

But they say that as we undertook to furnish further proof we ought to have done so—that we were in possession of the bills of parcels and ought to have produced them. The fact is not so, nor can it, in the nature of commercial transactions be so. We had the invoices, but not the bills of parcels, they were the vouchers of Harman Visger, who made the purchases; they remained in England and it could not be expected that we should send there for them. N. J. Visscher has produced his test affidavit, which is all that could be expected. |

p. 137 But there is an objection to the omission to claim 160 bundles of steel. By a comparison of the ships papers with the claim it will be found that he meant to claim, and did claim, the whole of the cargo. The omission of this item was by mistake.

The rule that *every* trading with an enemy subjects to confiscation, will not, I trust, be sanctioned by this Court.

All the essential parts of this transaction took place in peace, or in *imagined* peace. The rule of trading with an enemy is not absolutely *inexorable*. See the case of the *Madonna del Gracie*, and the principles stated by sir W. Scott in *the Hoop*. The danger of treasonable intercourse is the ground of the rule. But here was no such danger. Another ground of condemnation of goods is said to be their adherence to the enemy. But here, instead of adhering to the enemy, the goods were withdrawn by the earliest opportunity. It was certainly for the interest of the United States, that the goods should be withdrawn from the power of the enemy. But it is said that it was contrary to his allegiance. Is it contrary to his allegiance to do that, the forbearance of which would be for the advantage of the enemy? Why should we give a new face of terror to the principles of war?

The case of the Rapid was essentially different. *There* was opportunity for treasonable intercourse. She sailed from this country after the war was declared. Let not the rule be made an iron rule. It has been carried far enough. There is not a shadow of authority for condemnation in a case like this, where a mere remittance of funds acquired before the war was intended to be made at the first knowledge of the war.

All the cases cited against us, are to be found in the case of *the Hoop*, except one referred to in *Potts and Bell*. Not one of them includes the present case. 1. *The Ringende Jacob*, was a clear case of mercantile trading in open war. 2. The *Lady Jane*. This case is relied upon because the cargo was the produce of goods sent to Spain before the war. But the commercial adventure was planned and concocted *during* the war.

p. 138 3. The | *Deergarden of Stockholm*, was a case of trade with the enemy

wholly originating during war. 4. *The Elizabeth of Ostend*, was another clear case of trading during war. 5. *The Juffrow Louisa Margaretha.* According to the statement of this case in Bosanquet and Puller (*Escott's case*) part of the goods were purchased long after the war had broken out, and the adventure was projected in the heat of the war. One part of the cargo was considered as infected by the other. 6. The *St. Louis* or *El Allessandro.* In that case the goods were shipped in the midst of the war, and were bound to the port of an enemy. 7. In the case of the *Compte de Wohronzoff*, the goods were shipped long after the existence and knowledge of the war, and in the regular prosecution of trade. 8. So in the *Expedite von Rotterdam*, the exportation of goods was from the enemy's country in the midst of the war. 9. In the case of the *Bella Guidita*, the voyage was direct to an enemy country with provisions. 10. In *the Eenigheid*, the voyage was *to*, not from, the enemy's country, and was after the knowledge of the war. In that case there might be treasonable intercourse, but *here* there could be none. 11. *The Fortuna*, was the case of a voyage *to* the enemy's country, which might have been countermanded after knowledge of the war. 12. In the case of *the Freeden*, the voyage was also *to*, an enemy's port after notice of the war. 13. In the William, which is a case much relied on by the opposite counsel, it appears in 8, *T. R.* 560 that the sugars in question were received by the British merchant's agent from the enemy, after the war broke out, and were received *in the course of a general trade*, which is the feature that distinguishes this case of the *Mary* from all that have been cited.

The Claimants in those cases were general merchants in the regular prosecution of their trade ; but ours is a single case of accidental remittance of funds, constituting no part of a general trade. To this long list of cases sir John Nicholl *in Potts and Bell*, 8, *T. R.* 556, has added one more—*The St. Philip*, in 1747, where the lords refused evidence that the goods were bought before the war, being of opinion that the effects of British subjects, taken trading with the enemy, are good prize. This is certainly a hard case. It is very briefly stated ; none of the particular circumstances being mentioned. | It does not appear how long after the p. 139
breaking out of the war the goods were shipped, which would be a very important consideration in the innocence or guilt of the transaction.

This Court it is presumed will not push the law of war to its utmost extent, and certainly not farther than it has been extended by the English Courts.

As to costs. If the Mary was within the president's instructions, the captors are not entitled to costs and expenses.

STORY, *J.* When further proof has been ordered, are not costs and expenses to be allowed of course ?

PINKNEY, I think not.

*February 25th. Absent....*TODD, *J.*

MARSHALL, *Ch. J.* delivered the opinion of the Court as follows:

Nanning J. Visscher, an American citizen, administrator of general Garret Fisher, deceased, went to Great Britain in the year 1811, for the purpose of collecting the estate of the said general Garret Fisher in that country, and remitting it to the United States for those who were entitled to it by law. Immediately after the repeal of the orders in council, the said Nanning J. Visscher invested a considerable portion of the funds of the said estate in British merchandize, and engaged the brig Mary, a vessel having an American register, to convey it to the United States. The Mary was engaged at Woolwich and came round to Bristol, where her cargo was procured. She began to take it on board on the 3d of August, 1812; and on the 15th of August, having completed her lading, she sailed from the port of Bristol for the United States, having on board a British license dated on the 8th of July, 1812. While prosecuting her voyage she encountered such severe weather, and received such damage, as to be under the necessity, in order to avoid the danger of foundering at sea, to put into the port of Waterford, in Ireland, for the purpose of being
p. 140 repaired. While lying in Waterford | and undergoing repairs, she was also detained by a general embargo, imposed on all American vessels in the ports of Great Britain. The Mary, being released by the high Court of admiralty, and her repairs being completed, her license was renewed on the 27th of March, 1813, and she sailed from Waterford, for Newport, in Rhode Island, on the 7th of the following month. On the 22d day of April she was captured by the American privateer Paul Jones, captain Taylor, and brought into Newport, Rhode Island, where the vessel and cargo were libelled as enemy property. No claim being put in for the vessel, she was condemned; but the cargo, which was claimed by Nanning J. Visscher, for himself and the other heirs of general Fisher, was restored. From this sentence the captors appealed. In the Circuit Court the sentence of the District Court was reversed and the cargo was condemned. From this sentence of condemnation an appeal was taken to this Court, and the case was argued at the last term.

The president's instructions of the 28th of August, 1812, were then for the first time relied on, but it was not admitted on the part of the captors, that these instructions were known to captain Taylor. For the ascertainment of this important fact, it was necessary to admit further proof.

It being uncertain how this fact would appear, the Court also directed further proof on other points which were involved in some degree of doubt.

It is now proved incontestibly that the instructions of the 28th of August were on board the Paul Jones at the time of the capture. These additional instructions direct 'the public and private armed vessels of

'the United States not to intercept any vessels belonging to citizens of 'the United States, coming from British ports to the United States, 'laden with British merchandize, in consequence of the alleged repeal of 'the British orders in council.'

The effect and operation of these instructions were settled in the case of the *Thomas Gibbons*. The only enquiry to be made in this case is, do they apply to the Mary ? |

To sustain their application it must appear, p. 141

1. That the Mary belonged, at the time of capture, to a citizen of the United States.

2. That she was coming from a British port to the United States, laden with British merchandize, in consequence of the alleged repeal of the British orders in council.

1. Was the Mary the property of an American citizen ?

She carried an American register, which represented her as the property of James B. Kennedy, a citizen of the United States.

She sailed from Charleston, in South Carolina, as an American vessel, commanded by captain Stafford, a native American citizen, who continued to command her until her capture, and who always supposed her to be the property of Mr. Kennedy. Her first license, which was granted before intelligence of the declaration of war had reached England, was granted to her as an American vessel ; and in the renewed license she was still considered as an American vessel.

In opposition to this testimony is the deposition of one of the mariners, who supposes one Smith, a British subject, to be a part owner of the Mary, because the captain so informed him, and because Smith ordered the people about as much as Mr. Kennedy or the captain.

So much of this deposition as refers to the information of the captain, is not very probable ; and if true, must either discredit the captain's testimony, or be considered as a communication made for some particular purpose while the vessel was in a British port. That part of it which states Smith to have ordered the people about as much as Mr. Kennedy, is not very intelligible, since Mr. Kennedy, the owner of the Mary, does not appear to have been on board the vessel, or at Bristol, or at Waterford. |

Had a claim been put in for the Mary, this testimony, opposed to the p. 142 proof furnished by the register and the deposition of the captain, would have been light indeed.

But no claim was filed for the Mary, and she was consequently, according to the course of the Court of admiralty, condemned as enemy property.

This sentence is now relied on by the captors as establishing the fact. The argument has been pressed with great earnestness, and is certainly entitled to serious consideration.

The conclusive effect which the captors would give to this sentence is founded in part on reasoning which is technical, and in part on the operation which the fact itself ought to have on the human mind in producing a conviction that the claim was not filed because it could not be sustained.

A sentence of a Court of admiralty is said not only to bind the subject matter on which it is pronounced, but to prove conclusively the facts which it asserts. This principle has been maintained in the Courts of England, particularly as applying to cases of insurance, and has been adopted by this Court in the case of *Croudson and others v. Leonard.* Its application to the case at bar will be considered.

The Mary was not condemned by the sentence of a foreign Court of admiralty in a case prior to and distinct from that in which the cargo was libelled. She was comprehended in the same libel with the cargo.

The whole subject formed but one cause, and the whole came on together before the same judge. By the rules of the Court the condemnation of the vessel was inevitable ; not because in fact she was British property, but because the fact was charged and was not repelled by the owner, he having failed to appear and to put in his claim. The judge could not close his eyes on this circumstance ; nor could he, in common justice, subject the cargo, which was claimed according to the course of the Court,
p. 143 to the liabilities incurred by being | imported in a hostile bottom. In the same cause, a fact, not controverted by one party, who does not appear, and therefore as to him taken for confessed, ought not, on that implied admission, to be brought to bear upon another who *does* appear, does controvert, and does disprove it. The owners of the cargo had no control over the owner of the vessel. Visscher could not force Kennedy to file a claim ; nor could Visscher file a claim for him.

The evidence that the vessel was American property could not be looked into so far as respected the rights of Kennedy, because he was in contumacy ; but Visscher was not in contumacy. He was not culpable for, and therefore ought not to suffer for, the contumacy of Kennedy. That contumacy, in reason and in justice, ought not to have prevented the District Court from looking into the testimony concerning proprietary interest in the vessel, so far as the rights of other Claimants depended on that interest. Nor is the Court informed of a legal principle which should have restrained the district judge from looking into this testimony. If we reason from analogy we find no principle adopted by the Courts of law or equity, which in its application to Courts of admiralty, would seem to subject one Claimant to injury from the contumacy of another.

A judgment against one Defendant for the want of a plea, or a decree against one Defendant for want of an answer, does not prevent any

other Defendant from contesting, so far as respects himself, the very fact which is admitted by the absent party.

No reason is perceived why a different rule should prevail in a Court of admiralty, nor is the Court informed of any case in which a different rule has been established.

If the District Court was not precluded by the non-claim of the owner of the vessel from examining the fact of ownership, so far as that fact could affect the cargo, it will not be contended that an Appellate Court may not likewise examine it.

This case is to be distinguished from those which | have been decided p. 144
on policies of insurance, not only by the circumstance that the cause respecting the vessel and the cargo came on at the same time before the same Court, but by other differences in reason and in law, which appear to be essential.

The decisions of a Court of exclusive jurisdiction are necessarily conclusive on all other Courts, because the subject matter is not examinable in them. With respect to itself no reason is perceived for yielding to them a further conclusiveness than is allowed to the judgments and decrees of Courts of common law and equity. They bind the subject matter as between parties and privies.

The whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision. The reason on which this *dictum* stands will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the Mary, has constructive notice of her seizure, and may fairly be considered as a party to the libel. But those who have no interest in the vessel which could be asserted in the Court of admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties in the cause so far as respects the vessel. When such person is brought before a Court in which the fact is examinable, no sufficient reason is perceived for precluding him from re-examining it. The judgment of a Court of common law, or the decree of a Court of equity, would, under such | circumstances, be re- p. 145

examinable in a Court of common law, or a Court of equity; and no reason is discerned why the sentence of a Court of admiralty, under the same circumstances, should not be re-examinable in a Court of admiralty.

This reasoning is not at variance with the decision that the sentence of a foreign Court of admiralty, condemning a vessel or cargo as enemy property, is conclusive in an action against the underwriters on a policy in which the property is warranted to be neutral.

It is not at variance with that decision, because the question of prize is one of which Courts of law have no direct cognizance, and because the owners of the vessel and cargo were parties to the libel against them.

In the case of *Croudson and al. v. Leonard*, two judges expressed their opinions. Those who were silent, but who concurred in the opinion of the Court, undoubtedly acquiesced in the reasons assigned by those judges. On the conclusiveness of a foreign sentence, *judge Johnson* said, 'The 'doctrine appears to me to rest on three very obvious considerations: 'the propriety of leaving the cognizance of prize questions exclusively to 'Courts of prize jurisdiction; the very great inconvenience, amounting 'nearly to an impossibility, of fully investigating such cases in a Court 'of common law; and the impropriety of revising the decisions of the 'maritime Courts of other nations, whose jurisdiction is co-ordinate 'throughout the world.'

These reasons undoubtedly support the opinion founded on them; but it will be readily perceived that they would not apply to the case before the Court.

After stating the conclusiveness of the sentence of Courts of exclusive jurisdiction, judge Washington said, 'This rule, when applied to the 'sentences of Courts of admiralty, whether foreign or domestic, produces 'the doctrine which I am now considering, upon the ground that all the 'world are parties in an admiralty cause. The proceedings are *in rem;* 'but any person having an interest in the property may interpose a claim,
p. 146 'or may prosecute an appeal from the sentence. | The insured is emphati- 'cally a party, and in every instance has an opportunity to controvert 'the alleged grounds of condemnation, by proving, if he can, the neutrality 'of the property. The master is his immediate agent, and he is also 'bound to act for the benefit of all concerned; so that in this respect he 'also represents the insurer.'

The very foundation of this opinion that the insured is bound by the sentence of condemnation is, that he was in law a party to the suit, and had a full opportunity to assert his rights. This decision cannot be applicable to one in which the person to be affected by the sentence of condemnation was not, and could not be a party to it.

If the sentence condemning the Mary did not technically preclude the owners of the cargo from asserting in the Court of admiralty her

American character, the weight of the evidence on that point is to be fairly estimated.

In support of her American character, the documentary evidence is complete and unequivocal; and the corroborative testimony is calculated to strengthen a belief in the verity of the register. In support of her hostile character the omission of the owner to file his claim is chiefly relied on. The importance of this circumstance is not to be controverted. Its weight, however, is much diminished by the consideration that the case affords no reasonable ground for believing that the owner could have been restrained from making his claim by the apprehension of failing to support it. There is no testimony, and there is no reason to suspect that any testimony was attainable which could have successfully opposed the register. This consideration gives plausibility to the argument that the worthlessness of the vessel, the bottomry bond with which she was charged, the expectation that the condemnation would relieve him from that debt, might be the motives for not resisting that condemnation. It is possible, too, that in point of fact, he might not have actual notice of the proceedings. This is not to be presumed, and is not to benefit the owner; but it is possible; and may be taken into the | account in estimating the effect p. 147
of this negligence on persons who are not culpable for it.

It has been said that the owners of the cargo, and that Nanning J. Visscher, who held the bottomry bond, ought to have filed a claim. But the interest under the bottomry bond could not have been asserted; nor had the owners of the cargo any right to the vessel. Had they known that they were to be, in any manner, affected by the character of the vessel, they might, and most probably would have exerted themselves to have brought forward Kennedy as a Claimant, or to have accounted for his silence; but in the District Court the president's instructions were unknown, and their effect unthought of. The owners of the cargo, therefore, neither troubled themselves about the vessel, nor attempted to account for the claim to her not being filed. When afterwards in this Court the bearing of those instructions was discovered, and further proof was directed; that direction did not extend to proof which might account for the failure of Kennedy to assert his title to the vessel. This may excuse the Claimants for not producing testimony to that point.

Upon the best consideration we have been able to bestow upon the subject, the Court is of opinion that the Mary, in this claim, must be deemed to have been the property of an American citizen.

2. Did she sail from a British port in consequence of the alleged repeal of the British orders in council?

That the voyage in its inception was produced by the opinion that the repeal of the British orders in council would terminate the differences between the two nations, is too clear for controversy. Had the Mary

proceeded directly from Bristol to her port of destination in the United States, the counsel for the captors would not contend that it was not a voyage described by the instructions of the 28th of August. But the delay in the port of Waterford, it is said, has broken the continuity of the voyage, and in deciding on its character, the departure from Waterford, not the departure from Bristol, must be considered as its commencement. |

p. 148 It is not denied that, in a commercial sense, this is one continued voyage, to take its date at the departure of the Mary from Bristol. But it is urged that where the rights of war intervene, a different construction must take place.

The Court does not accede to the correctness of this distinction.

The Mary was forced into Waterford by irresistible necessity, and was detained there by the operation of causes she could not control. Had her departure been from a neutral port, and she had been thus forced, during the voyage, into a hostile port, would it be alleged that she had incurred the liabilities of a vessel sailing from a port of the enemy ? It is believed that this allegation could not be sustained, and that it would not be made. But as between the captors and the captured in this case, the voyage was, in its commencement, as innocent as if made from a friendly port. The detention at Waterford, then, can no more affect the character of the voyage in the one case than in the other.

But it is said that the owners of the cargo ought to have applied to the American government for a license to bring it into the United States.

So far as respects the captors, there could be no necessity for a license, since the vessel was already protected from them by the orders of the president under which they sailed ; and for any other purpose a license was unnecessary, provided the importation, if the voyage had been immediate and direct from Bristol, could be justified.

If a cargo be innocently put on board in an enemy country, if at that time it be lawful to import it into the United States, the importation cannot be rendered unlawful by a detention occasioned, in the course of the voyage, either by the perils of the sea, or the act of the enemy, unless this effect be produced by some positive act of the legislature.

There is no such act. |

p. 149 It has been contended that the act for the remission of fines, penalties and forfeitures in certain cases, passed on the 2d of January, 1813, controls the instructions given by the president on the 28th of August, 1812, and limits the operation of those instructions to the specific cases described by congress ; and as that act protects only those importations which were made previous to its passage, it has been argued that the president's instructions can go no further.

Independent of the war, all British merchandize was excluded from

the ports of the United States by a system of policy supposed to have been founded on the British orders in council.

The secretary of the treasury had power to remit forfeitures incurred under these laws. When the orders in council were repealed, large shipments were made of British merchandize by American merchants in the full confidence that the American restrictive system would fall with the orders which produced it. This opinion and the proceedings in consequence of it, were thought excusable both by the executive and legislative departments of government. The president instructed the cruizers of the United States not to molest vessels of this description, 'but on the 'contrary, to give aid and assistance to the same; in order that such 'vessels and their cargoes may be dealt with on their arrival, as may be 'decided by the competent authorities.'

These instructions act solely on the rights of war, and regulate the conduct of the public and private armed vessels of the United States.

The legislature passed an act on the 2d of January, 1813, taking away the discretion of the secretary of the treasury, and directing him absolutely to remit all penalties and forfeitures incurred by violating the non-intercourse laws, in all cases of importation made before the passage of the act, in American vessels, provided the goods were the property of citizens of the United States, and the vessels departed from any port of the United Kingdom of Great Britain and Ireland between the 23d day of June and the 15th of September then preceding. |

This act does not contemplate the conduct of captors, or the rights p. 150
of war. Its sole object is to remit certain penalties already incurred by a violation of municipal law. The legislature does not appear to have had in view the instructions given by the president to the armed vessels of the United States, much less to have intended to control those instructions.

But, in effecting these different objects, the executive and the legislature were impelled by the same motive—the peculiar hardship of exposing the citizens of the United States in such a case to the penalties either of war, or of municipal law. The one intended to protect from capture, the other from forfeiture, property which had been shipped in the reasonable confidence that peace and commercial intercourse between the two countries were the fruits of the repeal of the British orders in council. The president recognized the principle, but left the time within which it should operate, to be decided by the armed vessels and by the Courts, according to the circumstances of each case. The legislature prescribed certain limits within which it should operate. This Court, in construing the less explicit instructions of the president, with respect to the departure of a vessel from a British port, has respected the more explicit language of the legislature on the same subject. But the instructions of the president relate only to the departure of the vessel.

They do not extend to the time of its arrival. In this respect there is nothing to be explained. Consequently the act of congress can furnish no aid in their construction. That the instructions were intended to protect from capture all vessels which had sailed in that confidence which was inspired by the repeal of the British orders in council, however the voyage might be protracted, is apparent from their language, and from the fact that they continued to be delivered to the armed vessels of the United States after the passage of the act of the 2d of January, 1813.

It is the unanimous opinion of the Court that the Mary was, at the time of her capture, protected by the instructions under which the captor sailed.

This opinion renders all inquiry into the character of the cargo unnecessary. |

p. 151 The counsel for the captors have claimed their costs and expenses, on the ground that there was probable cause of capture.

This claim is sustained by the Court. Further proof has been required, and the lateness of the period at which the Mary was found on the ocean, justified a suspicion that her case was not one to which the instructions of the president extended.

The sentence of the Circuit Court condemning the cargo of the Mary is reversed, and the cause is remanded to that Court with directions to dismiss the libel so far as respects the cargo, and to restore the same to the Claimants, and to allow the captors their reasonable costs and expenses.

The Frances.—Boyer, master (Dunham and Randolph's claim).

(9 Cranch, 183) 1815.

If a British merchant purchase, with his own funds, two cargoes of goods in consequence of, but not in exact conformity with the orders of an American house, and ship them to America, giving the American house an option within 24 hours after receipt of his letter to take or reject both cargoes—and if they give notice within the time that they will take one cargo, but will consider as to the other; this puts it in the power of the British merchant either to cast the whole upon the American house, or to resume the property and make them accountable for that which came to their hands. The right of property in the cargo not accepted does not, in transitu, vest in the American house, but remains in the British subject and is liable to condemnation, he being an enemy.

*February 18th. Absent....*TODD, *J.*

IN this case further proof was ordered at the last term. (8 Cranch, 354.)

PINKNEY, *for the Claimants.*

The property vested in Dunham and Randolph by the shipment. It was made in consequence of, although not strictly in conformity with,

their orders; and delivery to the master of the vessel was tantamount to a delivery to themselves. The invoices and bills of lading all stated the goods to be shipped on *their account and risk.*

But if the property did not pass by the *shipment*, there is no reason why it should not pass *in transitu*, so that it be before capture. It is true that it cannot vest *in transitu* so as to defeat a vested belligerent right. But if the transfer take place, according to the original terms of the contract, before a belligerent right has accrued, it is not within the principle nor the spirit of the rule. If the further proof shows that the property had absolutely vested in Dunham and Randolph before the capture, it must be restored.

The further proof shows that the invoice, stating the shipment to be made for their account and risk, was | sent to them; and that D. and R. p. 184
wrote a letter before the capture of the Frances accepting the goods by the *Fanny*, and saying that they would *consider* as to those by the Frances.

The question then is, whether the whole of both cargoes did not thereby vest, *eo instanti*, in Dunham and Randolph.

The documentary evidence is clear and positive; it behoves the captors to show how it is qualified.

The condition upon which the property was to vest in the Claimants, was performed before the capture. They agreed to take the goods by the *Fanny*, and were instantly bound to take *both* shipments. They could not afterwards refuse *that* by the Frances. Their letter agreeing to take the goods by the Fanny was dated the 22d of August. The Frances was not captured until the 28th.

EMMETT, *on the same side.*

The surplus of goods, beyond the order was chiefly if not entirely in the Fanny and accepted by D. and R. so that there can be no question on the ground that the goods by the Frances were not ordered.

Dunham and Randolph's letter of 19th of September explains the cause of their partial acceptance.

DEXTER, *contra.*

This Court has decided that this was a condition *precedent*, and that the transfer could not take place until the condition was performed.

The first question is, whether, if the goods were accepted by Dunham and Randolph, either in fact or in law, the property could pass *in transitu*. The general principle is, that it could not. The question always is, in whom was the right of property *at the time of shipment?* The simplicity and celerity with which the trial of captures must be conducted require that the question should be limited to the time of shipment. For the | same reason, prize Courts have rejected equitable liens. If it were not so, p. 185
further proof would be required in every case. 6 *Rob.* 329—*note, Twen Venner Monk.* This rule is reasonable. Possession is evidence of owner-

ship. Change of title *in transitu* is only an exception to the general rule. The exception should be confined to the cases in which it has been held necessary, as where possession could not be delivered, &c. The papers on board are always sufficient for the captors. In a prize Court the documentary evidence is all important. This point is settled in the case of the claim of Jones and M'Gee in the *Venus* at this term.

As to the further proof produced in this cause, it is of very little importance. Dunham and Randolph did not comply with the condition upon which the property was to vest in them. They agreed to take a part only, and therefore were not entitled to any. It is immaterial whether this bound *them* to take the whole or not. It did not bind Thompson. He had a right to refuse to let them have any part, as they had not accepted the whole, or he might insist upon their taking the whole. It was at his option to call upon them to account, as his factors, for the whole. If *Thompson* had such a right, the *captors* have such a right, for by the capture they succeeded *jure belli* to all the rights of Thompson.

The time was past when they accepted the goods by the Fanny; they were in the custody of the law under the seizure of the revenue officers. Dunham and Randolph could only accept them conditionally; i.e. if they should be restored; but if they should be condemned they could not receive them.

It is not credible that they should have received them absolutely at the time they were under seizure. They did not *bona fide* accept them. It is not to be believed that they would take upon themselves the risk of their condemnation. It was probably done as a cover for the benefit of Thompson. The goods not being according to order they were not bound to accept them. Thompson made a new proposal to them. They did not accept it, but offered new terms on their part to which Thompson did not assent; so that there was no agreement. The property never passed. |

p. 186 EMMETT, *in reply*.

There are two questions in this cause:

1. The first is a question of fact, did Dunham and Randolph accept the goods?

2. The second is a question of law, can such an acceptance change the title *in transitu*.

1. Dunham and Randolph, relying on the justice of the United States, and that they would protect goods, the property of citizens of the United States, shipped on the faith of the declarations of their agents respecting the effect of the repeal of the orders in council, did *bona fide* accept them. This appears from their letter of the 19th of September. They had no motive to make the goods appear American rather than British—for in each case they would be equally liable to condemnation. They relied entirely upon the justice of the government.

The acceptance of the goods by the Fanny was absolute. The language used in regard to those by the Frances was intended to deceive the enemy, in case of British capture.

Thompson had no right to annex the condition to the acceptance. The goods were ordered by Dunham and Randolph. Thompson had agreed to execute the order, and was bound so to do. In shipping the goods he was executing an order, not making a bargain. Dunham and Randolph had a right to take to their own account the goods ordered, and receive the residue as a consignment to sell for the account of Thompson. If the question were now open I should say that these goods never belonged to the shipper. They were purchased by the agent of Dunham and Randolph by their order and for their account.

2. In point of law, what was the effect of the acceptance? The acceptance was good for both cargoes or it was good for neither. Thompson either had or had not a right to annex the condition. If he had not, then the goods were the property of Dunham and Randolph *ab initio*. If he had a right to annex the condition, they | had no right to reject it. p. 187
They were bound to take all or none—if they took part they were bound to take the residue. Their reservation of a right to consider as to the goods by the Frances, was void. The only remaining question is whether belligerent property can change *in transitu*.

Belligerent rights, in derogation of the common law, are to be construed strictly. They are not to be extended further than the state of war requires. 5 *Rob.* 161, *Vrow Anna Catherina*. The rules of war are not to be changed for the convenience of captors. It is true that the captors are to judge by the ship's papers; but here the ship's papers all shewed the truth of the case; and nothing but a single letter cast any doubt upon it.

The rule extends no further than that a neutral title *shall not originate* during the voyage.

If the title originated anterior to the war; if the shipment was made before the war, and not in contemplation of war; and if the condition, upon which the title was to change, was annexed before the war; such a contract could not be in violation of the belligerent rights.

Thompson had not an option to hold Dunham and Randolph to the acceptance or not as he pleased. If they did an act which bound them, he was bound also.

The acceptance must be considered absolute, and the condition not in derogation of belligerent rights.

*March 2d. Absent....*TODD, *J.*

JOHNSON, *J.* delivered the opinion of the Court as follows:

This claim is interposed to obtain restitution of three balès and nineteen boxes of goods captured in the Frances. As early as the 23d of

July, 1811, these Claimants, anticipating a repeal of the orders in council, give an order to Alexander Thompson of Glasgow, to ship them a variety of articles. In July, 1812, upon the repeal of the orders in council, Thompson ships the articles ordered; and, originally intending to ship to |
p. 188 the Claimants, a consignment on his own account, intermingles, with the goods ordered, a variety of others not contained in the order of the Claimants. These goods are shipped by two vessels, the Fanny and the Frances; and, by a letter dated the 11th of July, 1812, Thompson advises the Claimants of these shipments; and, after descanting on the merits of the articles, and declaring his reason for blending other goods with those shipped to their order, and his subsequent determination to make them an offer of the additional goods, he continues in these words: 'I leave it with yourselves to take the whole of the two shipments, or 'none at all, just as you please. If you do not wish them, I will thank 'you to hand the invoices and letters over to Messrs. Falconer, Jackson 'and Co. I think twenty-four hours will allow you ample opportunity 'for you to make up your minds on this point; and if you do not hand 'them over within that time, I will, of course, consider that you take the 'whole.' 'You will see, I think the reasonableness of your taking the 'whole, or none of the shipment.'

The Fanny reached the waters of the United States in safety; and, being seized by a revenue cutter, was carried into New London, where she has been finally restored. The Frances was captured on the 28th of August, by the privateer Yankee, and carried into Rhode Island. On the 22d of August, after the arrival of the Fanny, the Claimants write to Falconer, Jackson & Co. and accept of the shipment by the Fanny; but with regard to that by the Frances, they write in the following words: 'His letter also speaks of another shipment of thirty-one packages *per* '*Frances* which on arrival we shall then hand in our determination.' On the first of September following, they again write to Falconer, Jackson & Co. ntimating their acceptance of the shipment by the *Frances*.

On this state of facts it is contended that the Claimants are entitled to restitution—that they either had an original interest in the goods shipped, or had acquired one before the capture.

In the ordinary course of mercantile transactions, a delivery to
p. 189 a ship-master is a delivery to the consignee. | But it is evident that this delivery may be absolute or qualified, and that the effect of it must vary accordingly. A voluntary agent has the option either to enter upon his agency in strict conformity with the instructions of his principal, or with such reservations or conditions as he may think proper to prescribe; and the only consequence is, that, in the latter case, he leaves his principal at liberty to adopt or repudiate his acts. The shipper who purchases goods on his own credit or with his own funds, is not acting in the ordinary

capacity of a factor. If he were, the goods, even before shipment, would be the property of the individual on whose order the purchase is made. Such shipments are in the nature of a mercantile credit, and the shipper always retains the uncontroled exercise of discretion in extending it. There was, therefore, nothing inconsistent with the relative rights of the parties, in Thompson's imposing upon the consignees the condition of taking all or none of the two shipments ; and the consequence was, that the delivery was not absolute, but qualified ; and, until the condition performed, the goods remained the property of the shipper ; and had they suffered shipwreck, the loss would have been his.

But it is contended that the condition was performed, and that this case forms an exception from the rule that, as to the exercise of belligerent rights, there shall be no transfer *in transitu.*

The acceptance of the cargo by the Fanny was on the 22d, the capture of the Frances on the 28th of August. It is contended that the acceptance of the Fanny's cargo was conclusive as to both shipments ; and that, although partial in terms, it must, in law, have effect as to the whole, since such was the condition imposed by the shipper ; and that it was, in fact, the intention of the Claimants that such should be the effect of the acceptance ; but the reservation was intended only as a *ruse de guerre* to guard against the effects of hostile capture.

There is certainly nothing illegal in resorting to devices to elude hostile capture ; and where it can be clearly shewn that property is really neutral or friendly, its being covered under hostile habiliments for the purpose | of evasion, will not necessarily subject it to condemnation. But p. 190
the evidence must be less equivocal than that relied on in this case. The property was already captured and libelled as liable to American capture, when the Claimants' letter of the 19th September was written. To receive such evidence, under such circumstances, to so critical a point, would be to surrender every belligerent right to fraud and imposition. The letter of the 22d of August must, therefore, be taken on its plain import, and such effect given to it as its words imply.

This letter contains an express exclusion of the goods under consideration ; but it is contended that, as Thompson's letter left them no latitude, but obliged them either to choose or refuse the whole, their acceptance of part cast on them the property in the whole.

But we are of opinion that such was not the effect of this act of the Claimants. The consequence of such a doctrine would be that where a property is to be acquired upon a condition performed, the condition may be rejected, and yet the property acquired. It certainly put it in the power of the shippers either to cast the whole property upon the Claimants, or resume the property, and make the consignee accountable for that which had come to his hands. Falconer, Jackson & Co. upon the arrival

of the Frances, had she not been captured, would have had an undoubted right to demand the shipment made by her, on the ground of the Claimants' not having accepted it within the time limited ; and it would have been in vain for the Claimants to have contested their right, whilst they held the letter of the 22d of August, and Thompson's instructions on the subject of the acceptance. If, then, it rested with Thompson or his agent to retain the property in this shipment, or cast it upon the Claimants, the consequence is, that the legal interest still remained in the shippers.

This conclusion on the state of interest in the parties, renders it unnecessary to consider the argument urged to except this case from the rule relative to changes of property *in transitu* : and we hope it will be, at all times, recollected that the reasoning in this case is not founded on the implied admission of the distinction taken by the Claimants' counsel on this subject.

Thirty Hogsheads of Sugar (Adrian B. Bentzon, claimant) v. Boyle and others, being the officers and crew of the privateer Comet.

(9 Cranch, 191) 1815.

The produce of an enemy's colony is to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or whatever may be his place of residence.

An island in the temporary occupation of the enemy is to be considered as an enemy's colony.

In deciding a question of the law of nations, this Court will respect the decisions of foreign Courts.

*March 3d. Absent....*TODD, *J.*

APPEAL from the sentence of the Circuit Court for the district of Maryland, condemning 30 hogsheads of sugar, the property of the Claimant, a Danish subject, it being the produce of his plantation in *Santa Cruz*, and shipped after the capture of that island by the British, to a house in London for account and risk of the Claimant, who was a Danish officer and the second in authority in the government of the island before its capture ; and who, shortly after the capture, withdrew, and has since resided in the United States and in Denmark. By the articles of capitulation, the inhabitants were permitted to retain their property, but could only ship the produce of the island to Great Britain. This sugar was captured in July, 1812, after the declaration of war by the United States against Great Britain, and libelled as British property.

HARPER, *for the Appellant*, made two questions,

1. Is this case within the rule of the British prize Courts, that the produce of a plantation in an enemy's country shall be considered, while such produce remains the property of the owner of the soil, as the property of an enemy, whatever may be the general national character of the owner ?

2. If it be within that rule, is the rule to be considered in this country as a rule of national law ?

1. Sir William Scott, in laying down the rule in the case of the *Phœnix*, 5 *Rob.* 26, 20, refers to the case of *Juffrow Catharina* in 1783, and the reason of the rule seems to be that the proprietor of the soil incorporates himself with the permanent interests of the country. The rule is modern, p. 192
and several exceptions have been made to it. In the case of the Phœnix the claim was made by persons of *Germany* for property taken on a voyage from *Surinam* to *Holland*, and described as the produce of their estates in Surinam, which was then a colony of Holland, with which Great Britain was at war, Germany being neutral. Sir Wm. Scott admits that if the estates had been purchased while Surinam was in the possession of the British, the case would not have been within the general rule. So in the case of the *Diana*, 5 *Rob.* 60, (*Eng. Ed.*) those who settled in *Demarara* while it was under British protection, were held not to be within the rule ; and the case of the *Vrow Anna Catharina*, 5 *Rob.*161, (*Eng. Ed.*) is another modification of the rule. These cases were excepted, because *the proprietors had not incorporated themselves with the permanent interests of the nation.*

In the present case Mr. Bentzon never incorporated himself with the interests of the British nation, *either permanently or temporarily.* The character was *forced* upon him against his will ; he always disclaimed it. He was by birth, and always continued, a Danish subject. He did not voluntarily purchase a plantation in the country of the enemy. When he purchased his estate *Santa Cruz* was neutral. The occupation of the island by the British was temporary ; it was neither permanent in fact nor in law. Peace has restored the island to Denmark. Mr. Bentzon could not, by means of his estate in *Santa Cruz*, incorporate himself permanently with the interests of Great Britain.

2. But if the case comes within the British rule, are we to adopt that rule, and extend it to a neutral nation which has never itself adopted it.

It is but the ordinary case of a neutral carrying on his lawful trade with our enemy ; and has nothing in it contrary to the law of nations.

The rule contended for is a mere arbitrary rule, calculated to extend the field of rapine and to increase the maritime power of Great Britain. We have no interest in aiding those views.

What is the law of nations ? Not a rule adopted by one nation only, p. 193

but the law of nature, of reason, and of justice, applied to the intercourse of nations, and admitted by all such as are civilized. What is there in the code of any other nation to support this rule? It is to be found only in the maritime code of Great Britain; which is not more binding upon us than that of any other maritime power. It can have no force with us, but in cases where the rule of reciprocity or of retaliation will justify its use.

But Denmark has never used nor acknowledged the rule; and, therefore, we cannot justly enforce it against *her*. But if this Court should adopt the rule, we trust it will be with the strictest limitation.

PINKNEY, *contra*.

By the capture of *Santa Cruz* by the British, it immediately became the colony of an enemy. It is not necessary that the occupation should be perpetual; for the time it was *indefinite*, and during the occupation it was as much the colony of an enemy as any of his other possessions.

If, then, Santa Cruz was an enemy's colony, its produce, while it remained the property of the owner of the soil, was the property of an enemy. Sir W. Scott, in the case of the *Phœnix*, 5 *Rob.* 21, (*Eng. Ed.*) says that the rule has been so repeatedly decided both in that and the superior Court, that it is no longer open to discussion. No question can be made upon the point of law at this day.

The opposite argument goes to show that if the property in the soil be acquired before the capture of the island, the owner would not be considered an enemy, although the island should remain permanently a British colony.

The case of the *Phœnix* contains no exception to the general rule; it is, however, said that the case of *the Diana* shows an exception; but that was a mere question of *domicil*. The rule now under consideration was not discussed. |

p. 194 It is said that the party, in order to acquire the hostile character as to the produce of his estate, must incorporate himself with the interests of the enemy while the soil is in possession of the enemy. But the rule is not so. There is no difference whether he acquire the estate before or after it come into the possession of the enemy; if he continues to hold the estate, he becomes immediately incorporated with the nation *jure belli*.

But it is asked, is Great Britain to legislate for other nations? We say no. But this Court will pay great respect to the English decisions on this subject; especially as the rule has been acquiesced in by all the nations of Europe. Not one of them has remonstrated—not even Denmark. It has, therefore, the positive authority of England, and the negative authority of all the residue of Europe. The rule is not harder than that of *domicil*, to which it is analogous.

HARPER, *in reply.*

It is said that the rule is general, because all the nations of Europe have acquiesced in the English decisions. Several reasons may be given for this appearance of acquiescence. It is a recent rule. No authority can be produced for it earlier than 1783, just at the close of the American war. Peace having immediately taken place, removed the cause of complaint. And as to the late war with France, no case of the kind appears to have arisen. The edicts of France, &c. had a different bearing. It is said that the rule is analogous to that of *domicil.* But the rule of domicil rests upon a different principle—the principle of *allegiance* and the safety of the state. A man found in the enemy's country at the breaking out of the war receives the protection of that country, and is bound to do nothing to its injury ; and if he do not remove in a reasonable time is to be considered as having incorporated himself with the interests of that country. The rule of domicil is rather a rule of municipal than of national law ; and the principal ground of the rule is the necessity of preventing treasonable intercourse with the enemy. It becomes a part of national law only when it is applied to neutrals. It has no analogy to the rule now in question, | which was adopted merely to prevent the inter- p. 195
ference of neutral with belligerent rights.

*March 4th. Absent....*TODD, *J.*

MARSHALL, *Ch. J.* delivered the opinion of the Court as follows :

The island of Santa Cruz, belonging to the kingdom of Denmark, was subdued, during the late war, by the arms of his Britannic majesty. Adrian Benjamin Bentzon, an officer of the Danish government, and a proprietor of land therein, withdrew from the island on its surrender, and has since resided in Denmark. The property of the inhabitants being secured to them, he still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the produce of that estate, on board a British ship, to a commercial house in London, on account and risk of the said A. B. Bentzon. On her passage, she was captured by the American privateer, the Comet, and brought into Baltimore, where the vessel and cargo were libelled as enemy property. A claim for these sugars was put in by Bentzon ; but they were condemned with the rest of the cargo ; and the sentence was affirmed in the Circuit Court. The Claimant then appealed to this Court.

Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he

retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

Must the produce of a plantation in that island, shipped by the proprietor himself, who is a Dane residing in Denmark, be considered as British, and therefore enemy property ? |

p. 196 In arguing this question, the counsel for the Claimants has made two points.

1. That this case does not come within the rule applicable to shipments from an enemy country, even as laid down in the British Courts of admiralty.

2. That the rule has not been rightly laid down in those Courts, and consequently will not be adopted in this.

1. Does the rule laid down in the British Courts of admiralty embrace this case ?

It appears to the Court that the case of the Phœnix is precisely in point. In that case a vessel was captured in a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam.

The counsel for the captors considered the law of the case as entirely settled. The counsel for the Claimants did not controvert this position. They admitted it ; but endeavored to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his opinion, sir William Scott lays down the general rule thus : ' Certainly nothing can be more decided and fixed, as the principle ' of this Court and of the Supreme Court, upon very solemn arguments, ' than that the possession of the soil does impress upon the owner the ' character of the country, as far as the produce of that plantation is ' concerned, in its transportation to any other country, whatever the ' local residence of the owner may be. This has been so repeatedly decided, ' both in this and the superior Court, that it is no longer open to discussion. ' No question can be made on the point of law, at this day.'

Afterwards, in the case of the *Vrow Anna Catharina*, sir William Scott lays down the rule, and states its reason. ' It cannot be doubted,' he says, ' that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation.' |

This rule laid down with so much precision, does not, it is contended, p. 197
embrace Mr. Bentzon's claim, because he has not ' incorporated himself ' with the permanent interests of the nation.' He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

This distinction does not appear to the Court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general character. The acquisition of land in Santa Cruz binds him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny may be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British.

The general commercial or political character of Mr. Bentzon could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was, at that time, British ; and though as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy : he could ship his produce to Great Britain in perfect safety.

The case is certainly within the rule as laid down in the British Courts. The next enquiry is: how far will that rule be adopted in this country?

The law of nations is the great source from which we derive those p. 198
rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice : but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Without taking a comparative view of the justice or fairness of the rules established in the British Courts, and of those established in the Courts of other nations, there are circumstances not to be excluded from consideration, which give to those rules a claim to our attention that we

cannot entirely disregard. The United States having, at one time, formed a component part of the British empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it.

It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British Courts, will be considered as forming a rule for the American Courts, or that any recent rule of the British Courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The rule laid down in the Phœnix is said to be a recent rule, because a case solemnly decided before the lords commissioners in 1783, is quoted
p. 199 in the margin | as its authority. But that case is not suggested to have been determined contrary to former practice or former opinions. Nor do we perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

The opinion that ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, is an opinion which certainly prevails very extensively. It is not an unreasonable opinion. Personal property may follow the person any where; and its character, if found on the ocean, may depend on the domicil of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offence to the course of human opinion to say that the proprietor, so far as respects his interest in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of Mr. Bentzon as enemy property, this Court is of opinion that there was no error, and the sentence is affirmed with costs.

Cargo of the ship Hazard v. Campbell and others.

(9 Cranch, 205) 1815.

Neutral cover of British property.—Time for further proof refused.

*March 3d. Absent....*TODD, *J.*

APPEAL from the sentence of the Circuit Court for the district of Georgia, affirming that of the District Court which condemned the cargo of the Russian ship *Hazard*, as British property.

The Hazard was captured in December, 1813, about 6 miles from

the land of Amelia Island, by a boat from the United States Flotilla, and carried into St. Mary's, in Georgia. The boarding officer, after examining the ship's papers, returned them to the captain, and asked the captain's permission to stay on board that night, which was granted; and at the request of the captain the boarding officer assisted in piloting the ship over the bar of St. Mary's river, and brought her to anchor, after which he asked again for the ship's papers and then declared his intention to take the ship to St. Mary's. The captain in his protest states that the ship anchored nearer to the Spanish shore and harbour than to any other. The cargo was claimed in behalf of *Luning, Gogel & Co. of Gottenburg*.

CHARLTON *and* P. B. KEY, *for the Appellants*, contended,

1. That in as much as Russia and the United States, had both adopted the principles of the armed neutrality, the principle, that free ships should make free goods, was, as between those two nations, to be considered as part of the law of nations, and that the cargo was protected by the Russian flag.

2. That the capture was made within the territorial jurisdiction of Spain, and therefore void.

3. That the boarding officer practised a *ruse de guerre*, not justifiable towards a neutral. Fraud in war may be | practised towards an enemy, p. 206
but not towards a friend. *Duponceau's Bynkershoek*, 15. There ought to have been a *vis major* on the part of the Americans. They ought not to have decoyed the vessel out of neutral waters in order to capture her.

4. That the testimony was not sufficient to counteract the documentary evidence as to the interest of the Claimants. And,

5. That as the original German instructions from Luning, Gogel & Co. were taken away by the captors, and not produced on the trial, the Claimants ought to be allowed time for further proof.

JONES *and* PINKNEY, *contra*, insisted,

1. That there was no foundation for the idea that there can be a law of nations in force between Russia and the United States, which is not equally in force between the United States and all other nations. The United States do not contend that by the law of nations free ships make free goods.

2. That there is no foundation in fact for the allegation that the ship was captured within the jurisdiction of Spain; and if there was, Spain has not complained.

3. The artifice used, (if any *was* used) was perfectly justifiable. A neutral vessel must submit at all events. The deceit produced no effect of which the Claimants can complain.

4. That the evidence of fraud, in the use of the names of Luning,

Gogel & Co. to cover this property was too manifest to require argument. And,

5. That in a case so clearly fraudulent as this, further proof ought not to be allowed. It is alleged that the German instructions have been fraudulently withheld by the captors; their contents have been stated in substance by the supercargo; and if they were here they could not alter the state of the case. |

p. 207 *March 6th. Absent....*TODD, *J.*

LIVINGSTON, *J.* delivered the opinion of the Court as follows:

The ship Hazard and cargo were libelled as prize of war in the District Court of Georgia, where the latter was condemned, and the ship restored to the master with an allowance for freight. This sentence being affirmed by the Circuit Court, an appeal as to the cargo was taken to this Court.

The cargo was claimed in behalf of Messrs. Luning, Gogel & Co. subjects of Sweden, and residing at Gottenburg. It is impossible to look at the proofs in this cause, without being at once convinced that this house never had any interest in it. The papers found on board leave not the smallest doubt as to the hostile character of the property, which is also abundantly proved by the witnesses who were examined in the district Court. The shipment was made by Mr. Worrall, a British merchant at Liverpool, and an English supercargo put on board by the name of Diggles, under whom Mr. Dalmer, who filed the claim, was to act as assistant supercargo. Between Mr. Worrall and Mr. Lowden, who makes some figure in this transaction, there is proved to exist such an intimate connexion as to render the one chargeable for the declarations and acts of the other, so far as they regard this shipment. Mr. Lowden, in a letter to his correspondent at Charleston, which was on board of the Hazard, says—'There is likely to be a great deal of business done betwixt this 'and Amelia Island. The vessel that this goes by has about 9000*l.* 'worth on board. The parties interested are *my particular friends.*' And a little further on—'It may perhaps be satisfactory to know that we 'have full and unlimited authority from a respectable house in Gotten- 'burg, to make use of their name upon any occasion whatever; so that, 'in case of capture or detention, the necessary proof could easily be 'produced of the neutrality of the property.' Mr. Worrall writes to Mr. Smith, of Charleston, that 'the Russian vessel Hazard, bound to 'Amelia Island, was laden by *him in conjunction with some other friends.*' There was, also, a memorandum on board for the government of the
p. 208 supercargo, signed by Lowden, | containing, among others, this instruction, 'should you be boarded at sea by men of war or privateers, you 'must uniformly declare the property to belong to Luning, Gogel & Co.

'of Gottenburg, as it is represented to be by the documents accompany-'ing the cargo. Men of war are apt to board under false colors, and if 'you dont stick to the text, you may be deceived.' It may be asked here, why was the supercargo thus cautioned to be on his guard, unless he was in the secret, as he doubtless was, that the documents were colorable, and the property in fact British ?

Mr. Dalmer, in the claim interposed by him for the cargo, does not swear to its neutrality, but only that the gentlemen at Gottenburg are owners thereof, *as far as he is informed* ; and it is deserving of attention that Mr. Diggles, the supercargo, not only does not unite with the assistant supercargo in filing this claim, but, on being brought before the commissioners, refuses to be sworn or examined as a witness in the cause. On his examination, sometime afterwards, before the district judge, he states that 'he is not acquainted with the owners of the cargo or any 'part of it, and cannot swear that Luning, Gogel & Co. are the owners : 'that he received his instructions from Mr. Worrall as agent of that 'house.'

There was a short letter of instructions on board, to Diggles and Dalmer, dated 8th October, 1813, and proved to be signed by Luning, Gogel & Co. but the body of which must, no doubt, have been written by Mr. Worrall, or under his direction.

Now although the invoice be made out in the name and for the account and risk of Luning, Gogel & Co. and a letter of instructions signed by them was found on board, it would be giving more weight to these formal documents than they are entitled to, should we say, that they have satisfied us, notwithstanding the mass of evidence which this cause presents to the contrary, that the property was other than British through every stage of this transaction. Indeed, the advocates of the Appellant, despairing to convince the Court of its neutrality, rely principally on an irregularity in the capture, and on a suppression by the captors of a letter of instructions | from Luning, Gogel & Co. which it p. 209
is said came to their hands.

The capture it is alleged was made within the limits and jurisdiction of Spain. Of this there is no sufficient evidence, which renders it unnecessary to say what influence that fact, if established, might have on the ultimate decision of the Court. The suppression of the paper in question is also very imperfectly made out ; and if it had been brought into Court and formed part of the evidence in the cause, it could not possibly do the Appellant any good ; for a paper merely signed by Luning, Gogel & Co. and converted into a letter of instructions by Mr. Worrall, in Liverpool, to suit his own purposes, as must have been the case here, could have but little effect in removing any one of the numerous doubts which the circumstances of this case are so well calculated to excite.

A motion has also been made for an order for further proof. If the Court entertained any difficulty as to the reality of this transaction, or believed that Messrs. Luning, Gogel & Co. could prove that they were, in fact, the owners of this property, perhaps it might listen to the application late as it is; but believing, as it does, that the evidence, as it now stands, is not susceptible of any satisfactory explanation, and that the captors have made out a clear title to the whole cargo shipped by Mr. Worrall, it cannot, in justice to them, make any such order.

The sentence of the Circuit Court is, therefore, unanimously affirmed with costs.

Ship Societe.—Martinson, master.

(9 Cranch, 209) 1815.

If a neutral vessel be captured on her outward voyage from England to Amelia Island carrying a hostile cargo, which is condemned, & if by the charter-party the outward cargo is to be carried free of freight, but the homeward cargo is to pay at a certain rate to be ascertained by the nature of the cargo, yet the Court will decree freight pro rata itineris of the outward cargo, to be assessed upon the principles of a quantum meruit. This Court will not allow a new claim to be interposed here, but will remand the cause to the Circuit Court, where it may be presented.

March 3d. *Absent*....TODD, *J.*

APPEAL from the sentence of the Circuit Court for the district of Georgia, affirming the decree of the district Court which allowed freight *pro rata itineris*, to the Swedish ship *Societe*, captured on her outward
p. 210 voyage | from England to Amelia Island, with a British cargo on board, which was condemned as prize of war.

By the charter-party, the outward cargo to Amelia Island was to be carried *freight free*, and the homeward cargo was to pay at the rate of three pence halfpenny a pound for cotton, and in the same proportion for other goods.

PINKNEY & JONES, *for the ship owner*,

Contended, that the freight ought to have been given according to the charter-party, and not to be ascertained by assessors as ordered in the Court below.

SWANN, stated that he wished to interpose a claim to the cargo of the *ship Societe*, in behalf of the officers and crews of the United States' brig Rattlesnake and Enterprize as having been concerned in her capture; and was not certain whether this Court would now receive the claim, or whether it should be presented to the Court below.

THE COURT, said that it must be laid before the Circuit Court.

*March 6th. Absent....*TODD, *J.*

MARSHALL, *Ch. J.* delivered the opinion of the Court as follows:

William Little, a naturalized citizen of the United States, entered into a charter-party with Magnus Martinson, master of the Swedish ship, called the Societe, at London, on the 10th day of November, 1813, whereby the said Martinson let, and the said Little took the said ship to freight for the voyage and on the terms mentioned in the charter-party.

It was agreed, among other things, that the vessel should take on board a cargo, prepared for her in the Thames, and deliver it at Amelia Island, freight free. At Amelia Island she was to take on board such return cargo as might be tendered to her. If she could not be loaded there, she was to proceed to such port in the | United States as the agent p. 211
of Little should direct, and there receive her cargo. There were other provisional stipulations, and it was agreed that the freight on the return cargo should be a sum specified in the charter-party, which exceeded what would have been paid as freight on the return cargo alone had it been totally unconnected with the outward voyage.

On her voyage to Amelia Island, the Societe was captured by an armed vessel of the United States, and brought into the district of Georgia, where the cargo was libelled and condemned as enemy property.

A claim for freight was interposed by the master of the Societe, and the district judge appointed commissioners to ascertain the value of the freight on the voyage to Amelia Island, and decreed freight conformably to their report.

The Claimant of the cargo and the master of the ship both appealed to the Circuit Court, where the sentence of the district judge was, in all things, affirmed. From that sentence an appeal was prayed to this Court.

The cases already decided in this Court on the questions of domicil and trading with the enemy having completely settled this case, so far as respected the claim to the cargo, that part of the sentence is affirmed without opposition.

On the part of the master, it is contended, that his right to freight ought to be measured by his charter-party, not by any estimated value of the freight on the voyage to Amelia Island.

Had the charter-party contained any stipulation for freight to Amelia Island, that stipulation would unquestionably have governed the Court. But the outward cargo was to be delivered freight free. So far, then, as the case is controlled by the express stipulations of the charter-party, the vessel is entitled to the whole freight on a return cargo never taken on board, or to nothing.

The Court knows of no case of capture where the | neutral vessel has p. 212
been allowed freight for a cargo not taken with her. There is no lien on

one cargo for freight which may accrue on another. The Court can perceive no principle on which a cargo to be delivered freight free can be burthened with the freight agreed to be paid on a cargo to be afterwards taken on board. In this case, too, no sum in gross is to be paid for freight, but a sum depending on the quantity and quality of the return cargo. As between the captor and neutral owner, the Court cannot consider this as one entire voyage, but as distinct outward and inward voyages.

If the claim to freight on the return voyage, not commenced at the time of capture, cannot be sustained, the Court perceives no other rule which could have been adopted than that which the district Court did adopt. Freight has been allowed on the whole voyage to Amelia Island as on a *quantam meruit.*

The captors not having appealed, no question can arise on the propriety of having allowed the ship any freight whatever. The Court, however, will say that it is satisfied with the allowance which is made, and which is certainly an equitable one.

The sentence is affirmed with costs.

The officers of the Rattlesnake and Enterprize, armed vessels of the United States, offered a petition to this Court to be permitted to claim for themselves and their crew a share of the prize in the case of the Societe; alledging that they are entitled equally with the officers and crew of the Gun-boat by whom the said cargo was libelled; which petition was rejected, and the claim was not received; it being the opinion of this Court that the claim of the petitioners must be made in the Circuit Court, to which the cause is remanded.

The schooner Adeline and cargo.

(9 Cranch, 244) 1815.

American property re-captured may be restored on payment of salvage, although the libel prays condemnation of it as prize of war, and does not claim salvage. Salvage is an incident to the question of prize.

A test affidavit ought to state that the property at the time of shipment, and also at the time of capture, did belong, and will, if restored, belong to the Claimant, but an irregularity in this respect is not fatal.

A test affidavit by an agent, is not sufficient, if the principal be within the country, and within a reasonable distance from the Court. But if test affidavits, liable to such objections, have been acquiesced in by the parties in the Courts below, the objections will not prevail in this Court.

By the act of the 3d of March, 1800, one sixth part only is allowed to a privateer for salvage upon the re-capture of the cargo on board a private armed vessel of the United States, although one half be allowed for the recapture of the vessel.

The property of persons, domiciled in France, (whether they be Americans, French-

men or foreigners) is good prize, if re-captured after being 24 hours in possession of the enemy, that being the rule adopted in the French tribunals.

Further proof will be allowed by this Court, where the national character and proprietary interest of goods re-captured do not distinctly appear. Property unclaimed will be decreed as good prize.

*March 3d. Absent....*TODD, *J.*

THIS was an appeal from the sentence of the Circuit Court for the district of New York.

The American letter of marque, schooner ADELINE, sailed from Bourdeaux for the United States with a cargo, owned in part by citizens of the United States, and | in part by French subjects. On the 14th of p. 245
March, 1814, she was captured, in the bay of Biscay, by a British squadron, who put a prize crew on board and ordered her for Gibraltar. After being six days in the possession of the British she was re-captured, near Gibraltar, by the American privateer *Expedition*, who put a crew on board and ordered her for the United States, where she arrived and was libelled, with her cargo, by the re-captors, in the district Court at New York, as prize of war. The vessel was claimed by citizens of the United States residing therein, as was also part of her cargo.

Another part of the cargo was claimed by French subjects resident in the United States. Another part by French subjects, resident in France. Another part by citizens of the United States, resident in France. Another part by French subjects whose residence was not stated, and another part by citizens of the United States, whose residence was not stated, and another part by '*alien friends*' without stating of what nation, or where resident. Some of the claims stated the property, at the time of *capture* to belong to the persons therein mentioned, and did not state to whom it belonged at the time of *shipment.*

The district Court condemned, as good prize, all the property owned by Frenchmen and other persons resident in France, and all the property of those persons whose residence was not stated; and restored all the property belonging to persons resident in the United States, upon payment of *one sixth* for salvage. The vessel was restored, by consent of parties, on payment of *one half* for salvage. The sentence was affirmed *pro forma*, by consent, in the Circuit Court.

The re-captors appealed as to the rate of salvage, which they contended ought to have been *one half*, and those Claimants, whose property was condemned, also appealed.

The case was submitted to the Court by J. WOODWARD, and EMMET, *for the re-captors*, and by IRVING, and D. B. OGDEN, *for the Claimants*, upon their written notes for argument. |

J. WOODWARD, *for the re-captors*, made the following points: p. 246

1. That such claims as date the property from the time of capture, instead of the time of shipment, are insufficient and invalid.

2. That the re-captors are entitled to the whole of the French property, by the rule of reciprocity.

3. That the captors are entitled to a rate of salvage of one half upon the American property, or such other and higher rate than the rate decreed in the Courts below, as this Court may adjudge.

4. That the re-captors are entitled, by the same rule of reciprocity, to the whole of the property of such Americans as were at the time of capture domiciled in France, or resident there for commercial purposes.

5. That the re-captors are likewise entitled to all property the national character of which is not defined by the evidence.

6. That the property of those Frenchmen who are described as having a mere temporary residence in the United States, cannot be considered as American.

7. That the property of persons described as alien friends, without mentioning to what nation they belong or where they reside, must also be taken to be French, or decreed to the captors for uncertainty.

8. That the persons described in the claims as citizens of the United States, without stating their residence at the time of shipment, or at any other time, must, under the circumstances of the case, be considered as residing in France.

There are claims which date the property from the time of capture. This we say is insufficient. The claims should state the property from the time of *shipment* at least. This is necessary to prevent transfer *in transitu*, and to give effect to, and preserve the simplicity and dispatch of the *preparatorio* investigation. |

p. 247 An important question in this case is, what is to become of the American part of the cargo of an armed American vessel, re-captured by an American private armed vessel ?

The re-captors in the first place contend that the part of the cargo above mentioned is *casus omissus* as to the act of congress of the *3d of March*, 1800.

If the Court should decide that there is a *casus omissus* then the fate of this part of the cargo will depend upon the *common law*.

The re-captors contend that the common law is that if property so situated has remained twenty-four hours in possession of the enemy of the captured party, they are entitled to the whole of the property as prize of war. To this they cite *Grotius de jure belli ac pacis, lib.* 3, *ch.* 16. *Vattel book* 3, *ch.* 13, § 196. This right upon re-capture is here clearly laid down to *privateers* to be divested only by the laws of each state and treaties. Our treaty with France is silent except as to restoration on capture by pirates ; this being *ex delicto* there is no change of property by the original capture. See also professor Marten's summary of the law of nations, book VIII, ch. 3, § 10. ' In order to encourage privateering

'those concerned in it are allowed to hold all the merchant vessels and 'merchandize they take from the enemy or his subjects without any 'reserve whatsoever with respect to the redemption of them by the 'proprietor.'

The only remaining question on this point would be what kind of possession consummates the right of the privateer. Twenty-four hours possession has been considered '*firm*' possession, and sufficient to consummate this right by an almost common usage, and recognized by almost all the treaties of maritime powers. 1 *Rob.* 151, *Amer. ed.* 2 *Azuni*, 306, 308, 312, *in a note* 275, 276, *and* 282.

If the above considerations are inapplicable and the salvage of this part of the cargo is governed by the acts of congress, then by those acts, the re-captors are entitled to one half. |

The unqualified right of the privateer to the property captured, or p. 248
re-captured, is, after firm possession, clear at *common law*, and the doctrine of taking away that right by salvage is derogatory to that law. If this be so, the act of congress is derogatory to the common law, and must be *liberally construed in favor of privateers.*

The *reward* has always been out of the whole subject matter; the cargo as well as vessel and armament; and it is with confidence contended that a separation of the cargo so as to subject it to *one sixth* salvage, while the vessel and armament affords one half, is, if it exist at all, anomalous to the act of the 3*d of March*, 1800, and at war with the usage and treaties of all maritime states.

The reason of encreasing the salvage upon an armed vessel is the merit of battle, and it is evident that the cargo is as well won by battle as the armament and vessel.

But if the whole of the act of congress be to be taken together, and the 2d section be permitted to reflect a light upon the 1st section, it will appear that congress could have had no other meaning than that the salvage should be increased upon the cargo as well as the vessel and armament. In the second section where they give a salvage upon their own property thus captured by a private armed vessel, they give *one half of the goods on board* as well as of the vessel and armament.

But should not the cargo be considered as a mere *incident* to the vessel and follow its fate and character?

As to the French property we are entitled to the whole as prize of war by the foregoing rule of twenty-four hours possession which is the rule in France. Reciprocity is the rule in this case. *See the act of* 1800, *section* 3.

The twenty-four hour rule is established in France by ordinance of 15th June, 1779, with respect to all re-captures by privateers. France, in her treaty with Holland, 1st May, 1781, secures the twenty-four hour

right to privateers. The Court will find those acts of France referred to
p. 249 in 2 *Azuni*, 276 and 282. 2 *Dallas*, 2, *Miller* | *et al. v. ship Resolution.* This is a strong case establishing the twenty-four hour right. It refers to an ordinance of congress declaring this rule as to us, and refers to the French ordinance to the same point. It admits the twenty-four hour rule, but excludes its application to that case, that being the case of a neutral capture which conveyed no right. See also the case of the *Mary Ford*, 3 *Dall.* 188, *M'Donough v. Dannery.*

On the right of the re-captors on the 4th point of the case they will not enlarge by argument, as they consider it well established; nor on that of the 5th point than merely to observe that it appears to be just, *ex necessitate*, and comes under the description of *confusion* in the civil law; nor as to the 6th point than to observe that there is no standard by which a character can be reflected upon these Claimants but the *voyage itself;* which makes them either American or French. The description of the claim negatives the idea of their being American; they must, of course, be French. The 7th point must meet the same construction for the same reason.

As to the principle contended for in the 8th point of the case, it may be remarked, for elucidation, that some of the Claimants, described as in this point, turn out, by the evidence, to be *resident* in France for commercial purposes.

Is the owner of the vessel entitled to freight exclusive of salvage?

The re-captors say the vessel is not entitled to freight because she would have been condemned had she been brought into England. But if entitled to freight, the captors have *saved* that freight, and are therefore entitled to one half as salvage. Freight may remain, after all the rights of the captors are deducted, to be adjusted between the vessel and the freighters.

This question can only apply to the American part of the cargo; for as to the French, the rule is to vest the property *absolutely* in cases of re-capture after twenty-four hours possession: the *postliminii* right and all its incidents are destroyed. |

p. 250 Irving, *in behalf of the owners of the vessel, and of such parts of the cargo as were claimed by persons resident in the United States.*

The schooner Adeline is a registered American vessel owned by Isaac Levis and William Weaver, native citizens of the United States, and residents of Philadelphia, and was commissioned as an American letter of marque. She commenced her voyage from Bordeaux, to a port in the United States, in the month of March, 1814, having on board a cargo owned principally by citizens of the United States and others residing in our territory. In the course of this voyage, she was first captured by two British vessels of war, and was afterwards, and before

her condemnation as prize, re-captured by an American private armed vessel. Upon her first capture, most of her papers were taken from on board by the captors, and those which were left have been delivered up to the district Court at New York, and transcripts of the same are contained in the record before this Court.

In these cases most of the claims and test affidavits specify the property respectively claimed, at the time of shipment in the Adeline, and at the time of capture, to have been owned by citizens and residents in the United States.

Many of the claims and test affidavits testify that the goods thus claimed vested in the Claimants before and at the time of capture and re-capture ; and generally all the claims are supported by the respective bills of lading. In truth there is not a paper attached to this record which falsifies any claim or casts any suspicion upon them. An objection has been taken to some of those claims, because they do not state that the property vested in the Claimants at the time of shipment, and that, for aught that appears to this Court, the property might have been transferred *in transitu.*

Admitting this to be the fact, how can such transfer prejudice those Claimants ? The vessel was an American vessel coming from a *French port* to a port of the United States.

The rule, that the character of property must be determined | by its p. 251
shipment, that the same cannot be transferred in its transit, but, as respects belligerent rights, must be considered as remaining the same as at the time of shipment, applies only to *enemy property. Danckebaar Africaan,* 1 *Rob.* 90. *Amer. Edit.—the Vrow Margaretha,* 1 *Rob.* 285, *Amer. Edition.*

But the claims objected to will be found, on examination, to agree with those which are in common use in the admiralty Courts of England, even in cases where the property is captured as prize of war. *The Fortuna,* 2 *Rob. in the appendix,* 313. It is sufficient to assert property in the Claimants and to negative the allegation of title in the enemy at the time of capture. Those claims and test affidavits are testimony in a prize cause, and will be deemed satisfactory, unless there is some evidence in the ship's papers or preparatory examinations to invalidate them. *See the duke of Newcastle's letter in the appendix to Chitty.* 6 *Rob.* 55, *the Haabet.*

But to proceed to the merits of this case. Upon examining the libel of the captors, the first enquiry will be, whether this property *could be captured as prize,* for it has been so libelled.

The commission to our private armed vessels, under the act declaring war, authorizes the re-taking of property captured which was originally American. The property thus re-taken can only present a case of

salvage, because the title of the original proprietors never has been divested ; and that equally whether the property was originally American or neutral.

The interest of the captured property does not vest in the captor until after final adjudication. 5 *Rob.* 167, *Am. Edit. the Elsebe*—4 *sect. prize act,* 11*th vol. United States laws.* And the fifth section of the prize act provides, ' that all vessels, goods and effects the property of any citizen of the United States, or of persons within and under the protection of the United States, or of persons permanently resident within and under the protection of any foreign prince, government or state in amity with the U. States, which have been captured by the enemy and which have been re-captured by vessels commissioned as aforesaid,
p. 252 shall be restored to the rightful owners, upon | payment by them respectively of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any Court having competent jurisdiction, according to the nature of each case, agreeably to the provisions heretofore established by law.'

The present case, then, before the Court determines itself to be a case of salvage, if there was a right to re-capture, and if the service rendered was meritorious. The right is not questioned, for the re-capture was from the enemy ; nor is the service questioned, for the property would have been otherwise lost.

It becomes however a matter of enquiry, whether the re-captors under their present libel can have a decree for salvage. The papers taken from on board the vessel and the examinations *in preparatorio* proved that the re-captured vessel was an American vessel, and that her cargo was in part American and in part French. It was evident, therefore, that the re-capture could only present a case of *salvage* ; and as such the vessel and cargo should have been libelled. But the libellants have proceeded against the property as *prize of war,* and have asserted title to it as such in all their allegations. Must they not make out those allegations, and, if they fail, can they, as a last resort, seek for salvage, when such has not been prayed for in their libel, nor in any manner spread upon the record before this Court ?

But if the Court should be of opinion that a decree for salvage can be made upon the libel, claims and disclosures in this record, then the only question will be the amount of this salvage. The re-captors contend for a *moiety,* and we, that they should have but a *sixth.* Which is right must depend upon a just construction of the act in cases of re-capture, passed 3*d March,* 1800, 5 *vol. U. States laws,* 38—1 *Graydon,* 418.

The first branch of the first section of this act provides that ' a re-captured vessel, other than a vessel of war or private armed vessel, shall be restored, on payment of one eighth, (if taken by a public armed

vessel,) of the value of the re-captured vessel and cargo ; and if re-taken by a private armed vessel, of one sixth.' |

The second branch of that section provides ' that if the re-captured p. 253
vessel shall appear to have been set forth and armed as a vessel of war before such capture, or afterwards and before the re-taking, the salvage shall be one moiety of the true value of such vessel of war or privateer.'

The act contemplates two descriptions of cases as to vessels, viz. armed and unarmed ; the former are to pay a moiety, the latter a sixth. The law having settled the amount the Court when it ascertains what the law is, will adhere to the provision. Now the construction must depend on the evident meaning and intent of the legislature, as clearly to be gathered from a view of the whole provision ; and it may be adopted as a fundamental rule, that where there is an express provision, there shall not be a provision by implication ; *expressio unius est exclusio alterius*.

The first clause provides for the case of unarmed vessels and goods. It commences by stating ' that when any vessel unarmed, *or* when any ' goods,' (not on board such vessel, but wholly in the disjunctive,) when *any* goods (reaching any and every case of goods) when any such are captured by a private armed vessel, one sixth shall be allowed. It proceeds throughout the whole clause in the disjunctive, saying that such vessel *or goods* shall be restored on payment of one sixth as salvage.

The second clause is studiously confined to vessels, ' and if *such* ' *vessel* ' (passing by goods altogether and leaving the general provision for goods unimpaired,) and if *such vessel* is armed, then one moiety of the true value of *such vessel* is to be allowed ; repeating and carefully confining the provision to the *vessel*, and that, too, with a peculiar particularity. Congress in express words distinguish ; they place private unarmed vessels and all goods re-captured on the same footing.

The fifth section of the prize act, *laws of the United States, vol.* II, *p.* 240, § 5, declares that the above provisions are to regulate cases of salvage.

But it is contended that the *intent* of a statute is to be | considered, p. 254
that the *design* of the legislature is to be consulted. I grant it, wherever there is any ambiguity in a statute. In such case it is the privilege and duty of the Court to give a just construction. But this only holds in cases where there is great obscurity, not in cases where the provisions of the statute are clear and explicit. To hold that a Court can intermeddle with such provisions is to clothe the Court with legislative as well as judicial powers—to authorize it to make laws instead of only expounding them.

It is laid down in *Parker*, 233, that where the words of a statute are express, plain and clear, they ought to be construed according to

the genuine and natural signification and import, unless by such exposition a construction or inconsistency would arise in the statute by reason of some subsequent clause from whence it might be inferred that the intent of parliament was otherwise.'

But it is said that from the provision contained in the second section of the statute we may gather, that it was the intent of the legislature to give a moiety of the goods on board a private armed vessel to the re-captor, as well as a moiety of the vessel. When we come to examine this section, which is thus pressed into the service of the first, we shall find that it relates entirely to the property of the *United States* which may be re-captured. It has no reference to the first section, it speaks of property of a different description, differently owned. In the last clause it provides, that if a vessel of war of the United States is recaptured by a private armed vessel, a moiety of any goods on board shall be allowed. The government, deeply interested in the preservation of our *public vessels;* the national character, deeply interested in the rescuing from the enemy our vessels of war and in not permitting them to exist as mementos of their triumph; the national prosperity, deeply interested in preserving to us the means of our own strength and in preventing the same from being added to that of the enemy; these are sufficient inducements for our government to make an extraordinary provision. The service is not rendered to an individual, it is rendered to the nation; it is more meritorious; feelings of patriotism more than of interest
p. 255 may have impelled to the performance of the | duty; the danger was greater, the object more important; the recompense should therefore be encreased.

But the first and second sections of this statute are wholly independent. The first relates to the re-capture of *private property* either by our public or private armed vessels. The second relates to the re-capture of *public property* either by our public or private armed vessels. Each section is perfect in itself, and each independent of the other; neither requires the interposition of any Court to explain them.

'Wherever any words of a statute are obscure or doubtful, the intention of the legislature is to be resorted to in order to find the meaning of the words.' *Plowden* 57, *Wimbish v. Tailbois.*

Where words of a statute are plain and positive, it is not the province of the Court to search after new constructions.

Justice Buller remarks in the case of *Bradley & another v. Clark,* 3 *T. R.* 201, 'that, with regard to the construction of statutes according to the intention of the legislature, we must remember, that there is an essential difference between the expounding of modern and ancient acts of parliament. In early times the legislature used to pass laws in general and in few terms; they were left to the Courts of law to be

construed, so as to reach all the cases within the mischief to be remedied. But in modern times, great care has been taken to mention the particular cases in the contemplation of the legislature, and therefore the Courts are not permitted to take the same liberty in construing them as they did in expounding the ancient statutes.'

But the provisions in this statute respecting salvage were not unadvised provisions hurried over without deliberation. Congress, in consequence of the partial war with France, had been called on to legislate repeatedly upon the subject.

The first provision was by statute 28*th June*, 1798, 4 *vol. United States laws, p.* 154, *sect. 2d.* This is general | for vessel and cargo, armed p. 256
or unarmed, one eighth; all are placed on the same footing.

The second provision was by statute of March 2d, 1799, 4*th vol. United States laws, p.* 472. That gives, (if detained 24 hours,) one eighth; if 48 hours, one fifth; if 96 hours, one half; without any distinction between vessel and goods, or armed and unarmed.

The next year, induced by the inconvenience or inequality of the former laws, they made a deliberate provision. The subject was fresh; every clause was weighed. Those provisions had been a matter of investigation for three successive sessions of congress, and had been successively amended. Can it be said, then, that congress had not a view of the whole ground, that they were hurried in the passing of this law. The very law they were considering was *an amendment*, and would naturally cause enquiry and reflection.

In mature deliberation, therefore, they, in the year 1800, enact the present law. They discriminate between private unarmed vessels and goods, allowing one sixth for salvage, and for the *vessel alone*, if armed, a moiety. The recaptured property of the United States is placed in a distinct section, wholly unconnected with the other.

If we attend to the language of the last clause of the first section, giving to the recaptors the moiety of a private *armed vessel*, we shall ascertain the reason why a greater salvage was given for the vessel than the goods.

The section states, ' and if the vessel so re-taken shall appear to have been set forth *and armed as a vessel of war.*' If the enemy are thus possessed of the means of injuring our trade and of capturing other vessels, then, as the wresting those weapons from their hands prevents the perpetration of further mischief, for this meritorious service we will give to you one half of those instruments of annoyance and destruction. The same reasoning will not apply to the goods; the public reap not the same benefit from their re-capture.

But it has been heretofore argued in this cause, that a greater rate of salvage should be allowed than one | sixth, and that a construction to p. 257

that effect should be given to the statute, because the service was very meritorious; the property had almost reached an enemy port, and but for the management and intrepidity of the re-captors would have been wholly lost. And is not that the case in every capture by a belligerent? Did not congress know, when they passed this law, the difficulty of getting prizes home? Were they not then in fact more destitute of a navy than at present? In pursuance of this argument of extraordinary merit upon the present occasion, it has been urged that the re-captured vessel was armed; and that life was hazarded equally in re-capturing the goods as in re-capturing the vessel. In the present instance it is idle to talk of danger; the Adeline from her armament was incapable of making resistance, and whether she did or not is problematical, as from the preparatory examinations there appears to be an uncertainty whether any resistance was attempted. It is, however, certain that the resistance, if any, was a mere parade, and that having fired one or two guns, the vessel instantly surrendered. Not a soul was hurt on either side, and the privateer did not deem the resistance sufficiently important to return.

But admitting that the service, by any chance, might have been very meritorious; that great gallantry might have been displayed and many lives lost; yet under this statute I know not how any Court can interfere with its settled provisions.

In the case of the Apollo, 3 *Rob.* 250, which vessel was cut out from under the guns of a French fortress, where much daring spirit was evidenced on the part of the re-captors, and much danger hazarded, and where extraordinary salvage was applied for, Sir William Scott says, 'all re-captures within the act are put upon the same footing of merit and reward; therefore all that is said on the particular gallantry of the service is foreign to any singularly favorable application of this act which has provided but one measure for all cases, without reference to circumstances.'

With respect to the property of alien friends resident in the United
p. 258 States, and re-captured in this vessel, I | only remark that the provisions in the prize act apply equally to them as to our own citizens residing within our territory.

A claim has also been interposed by the owners of the schooner Adeline for freight and primage of that part of the cargo which is not owned by them. That such should be allowed I would respectfully contend there can be no question, as the voyage has been performed, and the cargo delivered at its port of destination. But the re-captors assert that they are entitled to a salvage of this freight. On the part of the owners this is opposed; first, because salvage of the freight is not given by the statute, and, second, because it is in fact allowed in the value of the goods.

The act has prescribed the terms on which the vessel and goods are to be restored. The Court cannot add to those terms. The re-captors have

no means of procuring this salvage except by witholding the goods ; but the act declares that the goods shall be given up, upon payment of one sixth of their value, without making any provision for salvage of freight. Against whom could the decree for a salvage of the freight lie ? Not against the goods, for they are delivered up ; not against the owners of the goods, for they are not before the Court.

But salvage of freight is in fact paid in the increased value of the goods. The presumption is that the merchandize is enhanced that value by the importation. Now the salvage is not on the invoice value, but on the *true value* of the goods. This value is ascertained by sale or appraisement at the place where the property is brought ; no deduction is made except imports and duties. Besides, the re-captors should not claim an additional recompense for perfecting that without which they could not participate in the cargo. The bringing this property safely in entitles them to the one sixth of its value, and that alone is specified in the statute as their reward.

The district Court, from whose decision the re-captors have appealed, decreed, on the 9th of August, 1814, that the re-captors should have as salvage one sixth part of all the goods on board this vessel owned by American | citizens and alien friends residing in the United States, and p. 259
also a moiety of the vessel, her tackle, apparel, &c.

In this decree the Claimants of that description acquiesced.

The re-captors have by successive appeals brought this case before this Court. The funds arising from a sale of this property, which sale took place before the decision of the district Court, have been lying unproductive in the last mentioned Court ever since. If this Court should affirm the decree of the Circuit Court in the above mentioned cases, then those Claimants pray that costs and damages may be awarded them.

D. B. Ogden, *for all the Claimants.*

This vessel and cargo were re-captured by the Expedition from the English, who had captured her, on a voyage from Bordeaux to New York. The Adeline is American property, and her cargo part of it American, part French.

The Adeline and cargo are libelled *as enemy's property*, and the libel prays that they may be condemned as such. The claims deny the fact of its being enemy's property, and aver that in some cases it is American property, in others that it is the property of alien friends.

Before I consider the questions raised by the captors, I must first beg leave to call the attention of the Court to some observations upon the nature of this cause as it appears from the libel, claims and evidence.

The libel charges the property as being enemy's, and prays for its condemnation as such. *The claim* denies the fact of enemy's property, and avers that it is American or the property of alien friends.

It is evident that the only point in issue, the only question arising between these parties upon the claim and libel, is whether this property be or be not enemy's, and as such liable to condemnation ?

p. 260 In all cases of prize there must be a *regular judicial* | *proceeding*, and so in all other cases in a Court of admiralty as well as in any other Court. (See the answer to the Prussian memorial, in the appendix to Chitty's law of nations, 314, also to be found in *collectanea juridica.*

All regular judicial proceedings consist of the proofs and allegations of the parties. The allegations of the parties are first made, and then the proofs are produced to support them. I understand the rule to be universal in all Courts in which there are regular judicial proceedings, that as a party cannot recover upon allegations without proof, so neither can he recover upon proofs without proper allegations. The judgment of the Court must be according to the *proofs and allegations.*

What are the allegations of the parties in this case ?

The libel is in the nature of a declaration in a common law Court, or of a bill of complaint in a Court of equity. It must state sufficient facts for condemnation, with sufficient certainty, and conclude with a proper and sufficient prayer. It must apprize the person claiming the property libelled of the grounds upon which a condemnation will be asked, otherwise it would be more than useless to require a libel at all.

Now this libel alleges or charges that this is enemy's property, and asks for a condemnation of it as such.

Unless the evidence in the cause proves it to be enemy's property, I apprehend the Court never will, under this libel, condemn it.

The documents on board the captured vessel, and all the examinations *in preparatorio*, so far from proving the property to be enemy's property, prove directly the reverse ; and indeed it is not contended by the counsel for the captors that there is the least ground to suspect the property or any part of it to be *hostile.*

Can the captors have a decree for salvage in this case ? I think not, because they do not ask for it in their libel ; because the question here is not whether the captors are entitled to salvage or not, but whether this

p. 261 is enemy's | property or not ? I do not believe a single case can be produced in the books where salvage has been decreed unless it was specially asked for by the libel. A libel, like a declaration, may contain several grounds of a decree, or, to speak in common law language, *several counts* : And there must be a count for salvage, or it cannot be decreed.

In *Hall's Admiralty practice*, 144, will be found a precedent of a libel where salvage is claimed, drawn by one of the most learned and experienced lawyers, particularly as a civilian, in the United States ; which, although no authority, will certainly be considered as entitled to some weight, as shewing the opinion of an enlightened lawyer upon the subject.

It is no answer to this argument to say that where property has been libelled as prize, property of friends is frequently condemned upon the ground of residence in an enemy's country or trading with an enemy, because such property is considered, *quoad hoc, as enemy's property*, and therefore comes within the allegation of enemy's property in the libel.

If I am right in the argument upon this subject, then I think it follows of course that if this is not enemy's property it cannot be condemned to the captors, but must be wholly restored to the Claimants without any salvage whatever. It is no hardship to the captors to acquit the property; they knew the facts when they filed their libel; they made their election in what way to proceed against it; and, like all other parties in a Court of justice, they must be bound by that election.

This, being property re-captured from the enemy, must be considered, *prima facie*, not as enemy's property. It cannot be presumed that they would capture their own property.

Now property re-captured from an enemy never can be proceeded against as prize of war; it is not considered as enemy's property until, in some countries, it has been carried *infra presidia*; in others, has been twenty-four hours in possession of the enemy; in England, and | under p. 262
our prize act, until it has been condemned in a competent Court.

If the captors have any claim to any part of this property, it must be because *re-captured from the enemy*. But no such claim is set up in the libel; the right of property remains in the Claimants; it has never been changed, and must therefore be restored to them.

But it is said that some of these claims are insufficient, because they do not say that the property belonged to the Claimants at the time of shipment, but merely at the time of capture.

I answer, if the property belongs to the Claimants *now* it is all which the Court will require in this case. I have already endeavored to shew that the captors have no claim to the property; it follows, then, that the Court will restore it to the *proper owners* at the time of the decree. Suppose, however, that I am wrong in the principles which I have endeavored to establish, and that the captors can have a decree in their favor in this case; let me enquire whether the claims above alluded to are not sufficient? All that is necessary for the claim is to deny the material allegations in the libel. The allegation here is that the property is enemy's property, and as such liable to be condemned. This allegation is expressly denied by the claim. Nothing more is ever required in a claim.

Where there are any circumstances which raise a presumption that the property is enemy's, such as coming from an enemy's port, found on board an enemy's vessel, &c. &c. then it becomes necessary for the Claimant to explain away those circumstances, to prove the friendly nature of the

property, to shew it to have been friendly at the time of its shipment, &c. which is done in what is called '*the test affidavit,*' not in the claim.

But in cases where the property, from the circumstances of the case, must necessarily be presumed to belong to our own citizens or our friends, (as in the case of a re-capture) then no *test affidavit* can be necessary; then no explanation is asked, because none is required. |

p. 263 If these claims are insufficient, does it follow that this property must be condemned?

The claims being insufficient, the Court will either suffer the Claimants to amend them, or they will consider them as no claims, and dispose of the property accordingly.

If an amendment is allowed, there can be no difficulty in removing this objection.

If the claims are considered as no claims, is the property to be condemned as a matter of course?

If the captors in case of capture send in a vessel, after taking out the master, supercargo and every other person who would probably claim, and leave on board only one or two of the crew whose examinations may be taken *in preparatorio*, and who are wholly ignorant as to the property on board,—if a vessel and cargo thus sent in is libelled as prize, is it to be condemned of course as prize, because no claim is put in or filed for it?

If all the papers and documents, and evidence *in preparatorio* prove the property not liable to condemnation, is it to be condemned because no claim is filed for it by the owner?

This doctrine would follow from the arguments upon the other side, but it is too monstrous to be supported by any Court.

I take the law upon this subject to be this, viz: The proceedings in a Court of admiralty are *in rem*. The subject matter is, in substance, in possession of the Court, and they never will decree it to the captors or to any other person, unless they can shew *a right to it.* They never will give the captors my property because I do not claim it, not being possibly in a situation to know that it has been captured or libelled.

If there be no claim filed, the Court will examine the papers and
p. 264 examinations *in preparatorio*, and if, from | the face of them, there appears good ground of condemnation, they will condemn, otherwise not.

It is not like the case of a judgment by default in a Court of common law, where the Plaintiff takes judgment for his debt; because, at common law, the process has been personally served upon the Defendant, he is actually in Court, or has been proceeded against to outlawry. No surprize can be complained of by him. Not so in a Court of *admiralty*, where the proceeding is *in rem*; and when the owner may never know that his property is in jeopardy. The Court being possessed of it are bound to give

it up to no body but him who has a good right to it. If from the libel and the proofs before the Court it appears that the captors are entitled to the property, the Court will decree it to them ; otherwise not. And for this, among other reasons, it is an invariable rule that a claim must always be put in *under oath*, so that if the Court order property to be restored to the Claimant, they may at least have some evidence of his right to it.

For these reasons if there were no claims put in to this property at all, yet, as from the proofs in the case taken *in preparatorio* it is clearly not enemy's property, I contend that the Court could not condemn it as prize of war.

This case, being that of a *re-capture*, is a case in which the questions are, whether the property shall be restored to the original owners, and upon what terms ? As there is no pretence that the property belongs to an enemy, there is no reason that the claim should negate a transfer *in transitu* ; which transfer is void only when its effect would be to neutralize belligerent property.

If the libel in this case be such as the Court can proceed upon to award salvage to the captors, I shall now briefly examine upon what terms the property in question must be restored to its former owners. This property consists,

1. Of the vessel claimed as American property and proved to be so. |

2. Of property of American citizens stated to be resident in the p. 265
United States.

3. Of property of American citizens, whose place of residence is not stated.

4. Of property of alien friends, resident in the United States.

5. Of property of subjects of France, residing in France.

First, as to the vessel.

By the act of congress of *26th June*, 1812, entitled ' an act concern-
' ing letters of marque, prizes and prize goods,' *section* 5, *vol.* 11, *p.* 240,
' it is enacted, that all vessels goods and effects, the property of any
' citizen of the United States, or of persons resident within and under
' the protection of the United States, or of persons permanently resident
' within and under the protection of any foreign prince, government or
' state in amity with the United States, which shall have been captured
' by the enemy and which shall be re-captured by vessels commissioned
' as aforesaid, shall be restored to the lawful owners, upon payment by
' them respectively of a just and reasonable salvage, to be determined
' by the mutual agreement of the parties concerned, or by the decree of
' any Court having competent jurisdiction, according to the nature of
' each case, agreeably to the provisions heretofore established by law.'

Now the provisions heretofore established by law are to be found in an act of congress passed on the *3d March*, 1800, *vol.* 5, *p.* 38.

This act after providing for the restoration, of vessels and goods, after re-capture, upon the rates of salvage therein mentioned, proceeds in these words, ' and if the *vessel* so re-taken shall appear to have been ' set forth and armed as a vessel of war, before such capture or after- ' wards and before the re-taking thereof as aforesaid, the former owner
p. 266 ' or owners on the restoration | thereof, shall be adjudged to pay, for and ' in lieu of salvage, one moiety of the true value of such vessel of war ' or privateer.'

Under this act I presume the Court cannot hesitate in affirming the judgment of the Circuit Court with costs and expenses of prosecuting this appeal.

Second, as to the property of American citizens, resident in the United States.

The act of *March,* 1800, *vol.* 5, *p.* 38, is positive in its provisions upon this subject, the property must be restored upon one sixth salvage.

The decree of the Circuit Court upon this property, I contend ought also to be affirmed with costs.

Third, as to the property of American citizens, whose place of residence is not stated.

This, in my view of the subject, is the only point in the cause upon which the mind can at all hesitate, and when this is fully considered, I trust all doubt upon it will vanish.

It is contended on the part of the captors, that as no place of residence is mentioned, these American citizens must be considered as resident in France, and that the rule as to the restoration of the property of French subjects must therefore apply to them. To this I answer,

First, I do not think the presumption a fair one, that because no place of residence is mentioned, they are therefore to be considered as residing in France. As they are citizens of the United States, it would seem to me that they ought fairly to be presumed as residing in the United States until some evidence is produced to the contrary.

If however the Court think it important, that the Claimants should prove their place of residence, they will, I presume, give us an opportunity of doing so. |
p. 267 *Secondly,* that the place of residence is wholly immaterial.

Because, being American citizens, and there being nothing unlawful in their residing in France, or any other country, with which we are at peace, they have not forfeited any of their rights as citizens of the United States. And the doctrine that residence abroad, gives a national character, applies only to the case of the subjects of two nations which are at war with each other ; or to neutrals residing in one of the two belligerent nations ; but cannot be applied to such a case as this. I forbear however to enlarge upon this point as unnecessary. *Because,*

The question, as to the terms upon which this class of Claimants are to have their property restored, depends upon the construction of the act of congress, which I shall now consider.

By the act of *March*, 1800, before referred to, it is declared, that when any goods which shall hereafter be taken as prize 'by any vessel, 'acting under authority from the government of the United States, 'shall appear to have before belonged to any person or persons *resident* '*within or under the protection of the United States*, and to have been 'taken by an enemy of the United States,' &c. This question depends upon the construction of the above clause of the section.

In order that the property should be restored upon the payment of one sixth salvage, it must belong 'to some person or persons resident 'within, or under the protection of the United States.'

If it belongs to *any* person *resident within* the United States, it is to be so restored; or if it belongs to any person who is *under the protection* of the United States, whether he resides therein or not, it is to be restored upon the same terms.

All foreigners who are permitted to reside in the United States, are under their protection, but no person who resides *out* of the United States is *under the protection* of the United States, but *their own citizens.*

In 2 *Cranch Rep.* 120, this Court held 'that an American citizen residing abroad is entitled to the protection of his government.' p. 268

Again, every foreigner who resides in the United States, must necessarily be under their protection, the words therefore '*or under the protection of the United States*' would be nugatory if intended to be applied to such foreigners, and no effect can be given to those words, unless they are applied to citizens, residing out of the United States, but who are still under their protection. But if the words of the act of *March*, 1800, are of doubtful import, their true construction is I think put out of all doubt, by the act of *26th June*, 1812, before referred to. These two acts of congress being in *pari materia*, must be considered as one act, and construed accordingly.

The *5th section of the act of June*, 1812, declares 'that all vessels, 'goods and effects, the property of *any citizen of the United States*, or of 'persons resident within *and* under the protection of the United States,' shall be restored 'agreably to the provisions heretofore established by 'law.'

Now there were no other provisions established by law, than those contained in the act of *March*, 1800.

It is evident that congress must have intended by the act of *March*, 1800, to provide for restitution of the property of *any* citizen of the United States, whether he resided within the United States or not. This is the only construction by which the provisions of these two acts can be reconciled.

That this was the construction intended by congress, when these laws were passed, will be still more evident when we examine with a little more care, the different phraseology of them.

The act of *March*, 1800, says nothing about citizens of the United States, but speaks of property belonging to persons resident within *or* under the protection of the United States, thereby meaning, as I contend,
p. 269 *all* persons who reside within the United States, *and* all citizens | under the protection of the United States, let them reside where they may.

The act of *June*, 1812, provides for the cases of property 'of *any* 'citizens of the United States,' and of 'persons resident within and 'under the protection of the United States.'

A foreigner, *residing in and under the protection* of the United States, is entitled to have his property restored under this act. This clause of the sentence does not apply to citizens at all, because their property is already provided for by the words 'any citizen of the United States.'

By the act of *March*, 1800, the property of all persons resident within, *or of persons under the protection of the United States*, is to be restored; without which latter words, no provision was made for citizens out of the country, these words were for that reason unquestionably inserted.

For these reasons I contend that it is immaterial where the American citizens reside, they are entitled to have their property restored upon paying one sixth as salvage.

Fourth, as to property of alien friends, resident in the United States.

No observations are necessary to prove that under the acts of congress referred to, they are entitled to restoration upon paying one sixth salvage.

As to them the decree I presume will be affirmed with costs and expenses.

Fifth, as to the property of subjects of France residing in that country.

By the *3d sect.* of the act of *March*, 1800, *vol.* 5, *p.* 40, this property is to be restored upon the same salvage on which, by the laws of France, the property of American citizens would have been restored to them
p. 270 under similar | circumstances. And if no law or usage of France is known upon the subject, the same salvage is to be allowed as if it were the property of a person resident in the United States, (viz. one sixth.)

Now I confess I have not been able to find what was the rule in France upon that subject.

Whether the ordinance of 1779, made upon this subject, and which is referred to in the argument on the other side, was in force at the time of this re-capture or not, or whether that ordinance, like almost everything else in that country, was destroyed during the dreadful revolution which she has just passed through, I know not. I confess my ignorance, and I have endeavoured in vain to obtain information about it.

If no such French rule is known to the Court, then I claim this property belonging to French subjects, residing in France, upon the same salvage which by the act of congress, it ought to be restored to them, if they resided in the United States.

EMMET, *for the Re-captors, in reply.*

Most of the cargo has been claimed; but no claim whatsoever has been put in for the property expressed in the bill of lading, No. 23, (26 bundles of steel to be delivered to C. W. Huty, of Philadelphia,) nor to that expressed in No. 35, (a harp and case of strings to be delivered to T. Delort, who has come in and claimed other property,) nor to that expressed in No. 39, (1 case of pencils, on account and risk of Mr. Fongarolly, of New York.) This circumstance would not have been noticed here, but that it is called for by part of Mr. Ogden's argument, who (partially admitting that a bad claim is tantamount to none at all) contends that the want of one is no ground for condemnation. In England, by the prize acts, regulations are made in case of non-claims for a limited time. In our Courts, for want of any such regulations, defaults, as I understand, are usually taken, but the property not put out of the power of the Court for a reasonable time. It is unnecessary to discuss the propriety of that arrangement in the present case; for certainly, after the lapse of a year, where the parties, who ought to claim, | are in p. 271
the immediate vicinity of the Court, and have come forward with no claim at all, or one not disclosing what is necessary to ascertain the innocent character of the property, or the foundation or terms upon which restoration should be had; where they have refused the sanction of an oath to verify documents that, without it, may well be questionable; there can be no ground for awarding restitution to them. Their silence, or evasive mode of claiming, must be regarded as intentional; and indicating that they cannot make out a fair case for restoration.

Mr. Ogden contends for restitution without salvage, on another ground; that this libel being for condemnation as enemy's property and prize of war, salvage cannot be awarded under it; therefore, says he, it must be restored without salvage. That conclusion is clearly illogical, for if it were true that salvage could not be awarded under these proceedings, the only consequence would be that the property should be retained, and the re-captors turned round to libel for salvage. The position itself, from which the conclusion is drawn, is also erroneous; for in all cases of *military salvage*, the proceedings are as against a prize, and the payment of salvage is a condition necessarily imposed by the decree of restitution on the Claimant. It is not properly the thing sought for by the Libellant and contested by the Claimant. I do not mean to say that it may not have been done from greater caution and perhaps want of practical experience, in the United States; or that it

done, it ought not to be supported, but it is neither usual nor necessary. Mr. Ogden refers to a precedent of that kind in Hall's admiralty practice. I have not the book by me, and cannot refer to the authority, but if it be a libel for mere military salvage, the introduction of it in that book shews that the author's ideas were not very well arranged upon the subject which occupied him ; for his book is only a translation of *Clark's Praxis Curiæ Admiralitatis*, which treats exclusively of the *Instance Court*, and has no relation to the prize Court of admiralty. It is sufficient however for me to say that no precedent of a libel for military salvage is to be found in Maryatt's Formulary, or any English book of authority, and that obviously all the cases in Robinson's reports, where such salvage
p. 272 is decreed, are brought up under the prize jurisdiction, | and were proceeded against as prize of war. Let me ask by what right was the Adeline taken by the Expedition and held ? Unquestionably *jure belli*. By what right, or by what course of proceedings were the re-captured crew examined *in preparatorio*, or the papers on board her opened and inspected by the prize commissioners ? Because she was subject to be dealt with according to prize law. By a former prize act of England (33 *G.* 3 *c.* 66, § 42,) it was enacted that re-captured ships set forth by the enemy as vessels of war, should *wholly belong* to the captors, and not be restored to the original owners. How was such a vessel to be proceeded against, but by libelling her as prize, and condemning her as enemy's property ? So in the present case, part of the re-captured property is French, which we contend (and for the present I shall take for granted) ought to be condemned to the captors and not restored at all. How are we to proceed for that condemnation, but by libelling as prize of war ? Why, under the rule of reciprocity, is it not to be restored ? Because by the French law belligerent property, of which an enemy has had 24 hours possession, is considered to have changed owners, to be the absolute property of that enemy, and when re-captured it is treated as the absolute property of that enemy, and condemned as such by libel for prize of war. The rule of reciprocity, (1 *Rob. Ad. Rep. Am. Edit. p.* 53, *in the case of the Santa Cruz*,) induces us to consider French property, (placed in such circumstances as would, under the laws of that country, be held to make a complete change of ownership of American belligerent property,) as also acquired by the enemy ; and to adjudicate upon it as actual enemy's property ; of course to libel and condemn it as prize of war. *Non constat* till the claims are put in and sworn to, but that property, apparently American, is actually French ; and it is necessary to proceed for prize, in order to get those claims and ascertain that fact. A remarkable instance of that occurs, even in the present case. The bill of lading (No. 15,) of 280 cases of claret, state them to be shipped by order and for account and risk of David Dunham, (presenting a *prima facie* case of

American property,) but when Mr. Dunham comes to claim on oath, he states them to be the property of Messrs. Johnson and Dowling subjects of the French empire. How was the knowledge of that fact to be obtained, but by forcing a claim on oath ? and if we | had proceeded by libelling p. 273
only for salvage of the property as American, how should we have learned that it was really subject to total condemnation as enemy's property, under the reciprocal application of the French law ? The proceedings in this way are also the most simple. The Libellant claims the benefit of his *prima facie* right arising from capture out of enemy hands *jure belli*. If there be any title to be opposed to this, it must be shewn and sworn to, and the Court will then decree, according to the extent of that title, either total restitution or restitution on terms of salvage. In ordinary *civil salvage*, which falls within the jurisdiction of the Instance Court, 2 *Rob. Ad. Rep. Am. Ed. p.* 178, *note on the case of the Hope*, the salvors never acquire a right of seizing the property, and their first step (if they proceed against it) is a warrant of arrest ; they then libel for salvage, because they have no superior or *prima facie* title to the thing itself ; and the contestation is about the amount. But a careful examination of Robinson's reports, 1 *Rob. Am. Ed.* 32, *Aquila.* 42 *Santa Cruz*, 228, *The Two Friends.* 3 *Rob. Am. Ed.* 249, *The Appollo.* 4 *Rob. Am. Ed.* 120, *The Franklin.* 5 *Rob. Eng. Ed.* 54, *The Carlotta.* 6 *Rob. Eng. Ed.* 410, *The Sansom*, will shew that is not the course of proceeding, where the property has been re-captured in war ; and the only reason why it is not more clear, is that the matter, being long established and of course, is not noticed in the very brief statements which that reporter prefixes to the arguments of counsel and judgment of the Court. Enough, however, is given to establish my position. The *Aquila*, (1 *Rob.* 32, 35,) was a case of *derelict*, and, properly speaking, would have belonged to the Instance Court. It appears, however, from the judgment, that ' some ' suspicions occurred that it was in fact the property of an enemy ; and ' under these circumstances it became expedient *to proceed against it* ' *as prize, for the purpose of meeting the pretensions of the ostensible neutral* ' *owner, and of bringing the examination of his claim, where alone it could* ' *be properly discussed, into the prize Court.* These measures were highly ' necessary, and therefore no objection can justly be made against the ' mode of proceeding.' In the case of *The Two Friends*, 1 *Rob.* 228, 231, 238, a protest was made against the jurisdiction of the Court over an American ship. The counsel on both sides allow that re-capture is a matter of prize jurisdiction ; and in the judgment, | sir William Scott p. 274
says, ' but whatever may be the law as to wreck and derelict, I conceive ' it does not apply to these goods, which I consider to be goods of prize ; ' for I know no other definition of prize goods, than that they are goods ' taken on the high seas *jure belli* out of the hands of the enemy ; and

'there is no axiom more clear than that such goods, when they come 'on shore, may be followed by the process of this Court.' In the case of *The Franklin*, 4 *Rob.* 140, the property was libelled as enemy's property and prize of war, and further proof was ordered of the property and destination. It was made and deemed satisfactory; but the captors insisted that restoration should only be made on terms of salvage. This was resisted by the Claimants with arguments which perhaps have given rise to the present point by the Claimants, although it was not a case of re-capture or seizure *jure belli* from an enemy. Sir William Scott held it was a case in which *no military salvage* was due; but directed (as the price of restoration in this prize cause,) a civil salvage of 500*l.* to be paid. In the case of the *Jonge Lambert*, 5 *Rob.* 54, reported in a note to the *Carlotta*, a *Dutch* ship and cargo captured by a French privateer and re-captured was libelled as enemy's property and prize of war. She was condemned in the Court below. The sentence was reversed on appeal, but as it was *neutral* property re-captured, the lords of appeal referred it to their surrogates to decide whether any and what salvage was due, with provisions for executing their decree. The surrogates decided that no salvage was due; but it is clear that if it had been a case for salvage, the restitution, on this reversal of the sentence of condemnation, would have only been on payment of it. It is unnecessary to discuss the arguments drawn from our different and totally inapplicable modes of proceeding under our municipal code. And I shall only add that if the objection taken to this mode of proceeding should be sustained, as the error, though fallen into after much consideration, arose from want of sufficient light and information in our books, it is hoped that the opportunity will be afforded to the salvors of instituting such proceedings as may be thought adapted to their case.

There is a matter about which the counsel for the Claimants have
p. 275 fallen into a mistake: they state the Libellants | to have appealed from that part of the decree which restores the ship on payment of a moiety of the value for the salvage. There is no such decree on the record. The restoration of the vessel on paying a moiety for salvage was agreed to by all parties, and therefore has in fact never been decreed at all and never has been disputed. If the vessel were understood to be included in the words of the decree, 'American property,' we should indeed have ample grounds of appeal; for the salvage ordered would be only one sixth. That, however, is not the case, and nothing is brought before this Court, but the questions relating to the re-captured *goods*. The same answer applies to the mistake, that we have appealed from the decree of the Court refusing us salvage on the freight. There is no such decree and we never asked it, as our libel shews, though the case of the *Dorothy Foster*, 6 *Rob. Eng. Ed.* 88, shews we are entitled to it. No question of

freight was ever presented in this case, but by the *claim* of Alexander Cranston (for the ship owners,) of freight for the goods not claimed by him for them ; meaning to make our salvage on the goods pay a proportion of it, and so diminish its amount. That was not adjudged, and of course we have not appealed ; though if it had been decreed, we certainly should ; for it could be supported by no principle, and would be directly contrary to the act of congress.

These questions being out of the way, nothing more remains but to consider what is to be the fate of the re-captured goods which have been claimed, with the incidental consideration of costs and expenses. Part of this property has been claimed, and sworn to, only as belonging to the alleged owners *before and at the time of capture*, without saying any thing as to its ownership *at the time of shipment*. On this insufficient mode of claiming and its consequences I shall add nothing to Mr. Woodward's argument except a reply to Mr. Ogden's observation, that there is no reason why such transfers *in transitu* between belligerent friends should be prevented. This very case shews otherwise ; for if the property continued French, it would be subject to condemnation as enemy's property and prize of war ; which belligerent right would be defeated by such a transfer.

I shall endeavour to simplify the discussion by first | considering the p. 276
great general division of French property, and of American property re-captured ; and will endeavour to class the doubtful cases under one or other of those heads.

As to the French property, it clearly must be judged upon according to the rule of reciprocity. In France, American belligerent property which had been 24 hours in the possession of the enemy captors would be treated and considered as their property, and not restored on salvage. The law of 24 hours possession has in truth been always the rule adopted by France and Spain, and most if not all the powers on the continent ; for although they may *desire* a decree of condemnation, they desire it only as the most portable and compendious proof of the facts (including 24 hours possession) from which the title has accrued. They do not regard the decree as *creating* a title to the property, which doctrine is in truth only confined to England and this country ; and was not held even by this country during the revolutionary war. France has also made an ordinance on that subject, which is to be found in 2 *Azuni*, 276, and of which this Court must well be held to have judicial knowledge ; for the prize Court, to which it has succeeded, has recognized it in the case of *Miller & al, Appellants v. ship Resolution*, 2 *Dallas*, 2. That this was the law of France down to and long after the revolution, has not been doubted ; and indeed cannot ; for Azuni's work was published after 1803, (*Vid.* 2 *Azuni*, 218,) but it is thought *possible* that

it may have been subsequently altered; and from the pretended ignorance on that subject, a claim for restoration on American salvage is made. The claim is singular; for it is predicated not on the rights of the parties, but on the supposed ignorance of the Court. It is not sanctioned by the words of the act of *March 3d*, 1800, (§ 3, *vol.* 5, *p.* 38,) which provides that 'where no such law or usage shall be known,' the same salvage shall be allowed as is provided by the *1st section* of that act. That means, where no such law or usage shall be made known or promulgated or acted upon. It refers to cases in which, on enquiry, a state shall not be found to have adopted any precise law or usage on the subject; but it founds no right to a suitor, on supposed judicial ignorance. The ordinance of 1779 is, however, a known law, and it
p. 277 must be considered as valid until those who insinuate | its abrogation give some proof of their assertion. The *onus* is with them, and the means of proof, coming from their own country, are certainly within their power. 1 *Rob. Am. Ed. p.* 56, 57. The presumption as well as the fact, therefore, is that there has been no variation or abrogation of the ordinance of 1779.

The property of American citizens resident in France must, as I conceive, be considered as French, and subject to the same rule. This effect of domicil or national character is produced in every case where that character is judged of merely by the law of nations. Birth, by the municipal laws of many countries, is considered as fixing an indelible national character; but that doctrine seems entirely dependent on municipal law, and is not to be found in the writers on the law of nations. Birth, with them, affords a *prima facie* presumption of residence, and serves to establish it where other facts are equivocal or silent; and in that sense sir W. Scott must be understood, when he says, in the case of *La Virginie*, 5, *Rob.* 98, 99, 'that the native character easily reverts, 'and that it requires fewer circumstances to constitute domicil in the 'case of a native subject than to impress the national character on one 'who is originally of another country.' But birth ceases to afford evidence of the national character under the law of nations, when opposed to a clear residence, *animo manendi*, in another country; for, says sir William Scott, in *the Indian Chief*, 3 *Rob. Am. ed.* 23, 'no position is more 'established than this, that if a person goes into another country, and 'engages in trade, and resides there, he is by the law of nations to be 'considered as a merchant of that country.' In some of these cases (the particulars of which I shall hereafter point out) it may perhaps be contended that, although the owner of the property appears to be resident in France, the permanency of his residence or the *animus manendi* does not appear; but to that I again answer in the words of sir Wm. Scott, in the case of *the Bernon*, 1 *Rob. Am. ed.* 87, 88, 'wherever it

'appears that the purchaser was in France, he must explain the cir-
'cumstances of his residence there: the presumption arising from his
'residence is, that he is there *animo manendi*, and it lies on him to
'explain it.' For every purpose, therefore, either of commerce or of
war, to be decided upon | solely by the law of nations, these American p. 278
citizens resident in France must be regarded as Frenchmen. But it is
contended that with respect to salvage they are protected by the words
used in the act of congress of March 3*d*, 1800, § 1, *vol.* 5, *p.* 38, 'any
person or persons resident within or under the protection of the United
'States;' which last expression, it is said, necessarily includes American
citizens every where. If this were the intention of the legislature, it is
very singular that it did not simply say 'any citizen of the United States,
'or any person or persons resident therein.' It seems to me, however,
that the word *resident* which is *expressed* in the first, is *understood* in the
second member of the sentence; and that it should be read 'any person
'or persons resident within, or resident under the protection of the
'United States.' An inhabitant of one of the territories comes within
the last but not the first description—so does a consul or other public
minister who has not by habitual commerce and residence acquired
another national character. Other instances of residence under the
protection of the United States might be produced; but an American
who has changed his national character, and become, for every purpose
of war and commerce, a member of another community, can no longer
be regarded as under the protection of the United States. I am at a
loss to see how America could afford protection to him. If she were
neutral, and the country of his residence belligerent, would his com-
merce from that country be under her protection? The laws relating
to re-capture and salvage were made with a view to America's being
belligerent, and must be construed in relation to that state of things:
In that state, does she or can she afford any protection to a merchant
residing abroad, whose protection and character must exclusively depend
on the hostility or neutrality of the country to which he belongs as a
permanent member? The interpretation put upon this phrase by Mr.
Ogden would make the first and third sections of the act of *March* 3*d*,
1800, at variance with each other, and the same person subject to two
inconsistent measures: for unquestionably such an American per-
manently resident in a foreign friendly country comes under the descrip-
tion of a 'person permanently resident within the territory and under
'the protection of a foreign prince,' &c. |

The *fifth section of the act of June*, 1812, cannot explain the antecedent p. 279
law of *March*, 1800; for it is obviously inadvertently worded, and not
intended for any purpose of explaining, altering, or affecting that law.
If the mistaken substitution of the word *and* for *or* could have any effect,

it would be only to shew that no person residing out of the United States in a consular or public capacity could be deemed under their protection. The truth, however, is, that the last act contemplates nothing more than to place re-captures by private armed ships, on the same footing with those made by public vessels of war; and it accomplishes that by a very loose phraseology.

If I am well founded in the foregoing arguments, it will follow that the decrees of the Courts below respecting French property and that of all the residents in France, whether native Americans or not, should be affirmed; and (if costs and expenses are to be at all given in this case) with both.

I shall now consider the question as to clear American goods re-captured. The Adeline was a private vessel of war, having a letter of marque; and, when in the possession of the English, she fought with and made resistance to the privateer Expedition. There can, therefore, be no question but that the salvage of the vessel itself must be one half. The Claimants, however, contend that such a rate of salvage only extends to the vessel; but that goods re-captured on board of even an armed and commissioned vessel must be restored on paying one sixth; that being the rate specified in the act of *March 3d*, 1800: and in support of this opinion several rules for the construction of statutes have been cited. It is my duty, and I trust I shall do it successfully, to maintain the opposite doctrine. In order to do so, I shall observe that salvage has, in every country and in every code of laws, been considered as a matter of general average: the service is an act done for the common benefit, and to be recompensed by common and proportionate contributions. Vessel and cargo always contribute expressly; freight, in some cases, expressly; in others, really but less obviously, where the salvors receive their proportion of the cargo or its value without paying freight.
p. 280 If the act of *3d March*, 1800, meant to | break in upon this established principle of proportionate contribution for a common benefit, it is without precedent in any other code; and an unreasonable departure from an universal usage founded on justice and common utility. Such a supposition should not be indulged in; and it is indeed fully contradicted by the second section of the same law; for there, regulating the salvage on the re-capture of a public armed vessel, it enacts that for the re-capture of a public armed vessel *or any goods therein*, one moiety of the true value thereof shall be paid. No satisfactory reason has been or can be assigned why the United States should be obliged to pay differently and in a greater proportion for the benefit of re-capture than private individuals deriving equal advantage from the act. This second section of the act naturally presents the question, how it happened that the legislature omitted to mention expressly in the first section, goods on board such

armed vessel? I think I can answer it. The first section is copied from the English statutes on the same subject, varying the proportion of salvage, and with one addition the operation and force of which, perhaps was not sufficiently adverted to at the time. Statutes of 13, *G.* 2, *c.* 4.—17, *G.* 2, *c.* 3.—29, *G.* 2. *c.* 34.—16, *G.* 3, *c.* 5, & 33, *G.* 3, *c.* 66. They give one eighth for salvage of vessel and goods, but enact, that if the re-captured vessel shall have been *set forth as a vessel of war during its possession by the enemy*, the salvage for the vessel shall be one half. Here the principle of proportionate contribution for a common benefit was not departed from; for to set the vessel out for war, it must have been conducted into port, and, of course, the cargo which it carried at the time of capture discharged, and the connexion between them broken; the goods which such a vessel might have on board when re-captured would be enemy's property, and condemned as prize of war. The British acts, therefore, made no mention of such goods, they not being a fit subject for restoration on salvage. Congress, in preparing their system, although they adhered to the phraseology of the English code, thought that the same service was rendered by capturing an armed vessel, whether it was originally fitted for war by Americans or their enemies, and therefore awarded an equal compensation in both cases; but perhaps they did not advert to the fact, that, in the new case which they were introducing, recaptured | goods would have to be restored, and they therefore adopted p. 281
the language of the *British laws* without inserting a provision to meet a situation of things that could not exist under *them*. Or else, considering the character of average contribution as necessarily fixed on salvage by universal usage, and equal justice, they thought it unnecessary to do more than settle the rate of contribution; and the state of the vessel being the circumstance that was to affect that rate, they spoke of it alone; but conceived and intended that a proportionate contribution from every thing connected with it in danger and benefit conferred, would follow as an incident. If the first supposition be true, the awarding of salvage for the re-captured goods on board an armed vessel is a *casus omissus;* and the least we can be warranted in saying is, that it is in the discretion of the Court to settle that rate. If it be, I trust it will be settled by analogy to the rule made in the act itself, and so as to preserve the harmony of the whole system. If the second supposition be correct, then the word *vessel* must be considered with a liberal interpretation, as also including all on board of it. And in support of such an interpretation, calculated to preserve received and established usage against a literal meaning, I may refer to the opinion of the Court as delivered in the case of *Talbot v. Seaman*, 1, *Cranch*, 1. There the Court had occasion to consider the meaning of the expression 'any nation in amity with the United States' used in the act of *March 2d*, 1799, relating

also to re-captures from the enemy : the counsel for the captors contended that the words of this law gave salvage on the re-capture of neutral property ; founding themselves, like our adversaries, on the literal extent of the expression. On which the Court observes—1, *Cranch*, 43, ' The words of the act would certainly admit of this construction. Against ' it, it has been urged, and we think with great force, that the laws of ' the United States ought not, if it be avoidable, so to be construed as ' to infract the common principles and usages of nations, or the general ' doctrines of national law.' The impossibility of having access to authorities, prevents my citing many instances of statutes similarly construed, which I have no doubt could be easily furnished. The following however happen to be within my power—*Plowd.* 366, *Zouch v. Stowell*,
p. 282 ' a thing which is within the intention of the makers | of the statute, is ' as much within the statute, as if it were within the letter.' In *Eyston v. Studd, Plow.* 467, that equitable construction which enlarges the letter of a statute ist hus defined, ' *Æquitas est verborum legis directio efficatius* ' *cum una res solummodo legis cavetur verbis ut omnis alia in æquali genere* ' *eisdem caveatur verbis.*' And there the remedy given by the 9, *E.* 3, *c.* 3, against executors, it is said, has been always extended by an equitable construction to administrators ; because they are within the equity of the statute. *Platt v. the sheriff of London, Plowd.* 36, the words of the 13, *E.* 1, are, ' *circumspecte agatis de negotiis tangentibus Episcopum* ' *Norwicensem ;* ' yet this statute, although only the bishop of Norwich be named, has been always extended, by an equitable construction, to other bishops.

Some of the claims in this cause are for property owned by *aliens resident in the United States.* Where that residence is not clearly made out to be permanent, the Claimants must take the consequence of the insufficiency of their claims and proofs. They are all Frenchmen, and if they have not shewn a sufficient domicil to obtain for them the American national character, they must be considered as Frenchmen and abide the reciprocity resulting from their law. Where they are clearly permanent residents within the United States, they will be entitled to the benefit of that character, if my reasoning as to Americans domiciled in France be correct ; if it be not, they must suffer under the rule the Court will then lay down and be regarded as Frenchmen.

It only remains for me now to say a few words of costs and expenses which are asked for by the Claimants. This case is brought before this Court by their voluntary act and a clear consent, without which it could not have been presented on appeal. The district judge declared the principles he would adopt for his decision ; but, strictly speaking, he made no decree on the case of any individual Claimants. Those principles were considered in some respects erroneous by the counsel for the captors,

and in others, by those for the Claimants. It was therefore considered better to bring all the principles in review before the Supreme Court, as the expence would be little if at all increased by so doing; and if any Claimant had been unwilling to become a party | to this arrangement, he p. 283
might have withheld his consent; and his case could not have been brought up on appeal, till a decree had been made on his individual claim. I submit that it is therefore now too late for him to talk of costs and expenses; and in truth impossible to ascertain what proportion of costs or expenses he can sustain.

March 10*th*. *Absent*....TODD, *J*.

STORY, *J*. delivered the opinion of the Court as follows:

The American letter of marque, schooner Adeline, with a valuable cargo on board, was captured on her voyage from Bordeaux to New York, on or about the 14th of March, 1814, by a British squadron; and, on or about the 19th of the same month, was re-captured by the American privateer, Expedition, James Clayton, commander, and brought into New York for adjudication. Prize proceedings were immediately instituted against the vessel and cargo as enemy property; and various claims were interposed in behalf of American and French merchants. Upon the hearing of the cause, the district Court decreed a restoration of all the property of American citizens and other persons resident in the United States, upon the payment of one sixth of the value as salvage, and condemned all the property of French subjects and of American citizens domiciled in France, and of all others whose residence remained unexplained, as good and lawful prize to the captors. From the former part of the decree the captors appealed, and from the latter part the Claimants appealed to the Circuit Court; and from an affirmance *pro forma* of the decree in that Court, the parties have appealed to this Court. It does not appear in the record that any decree was pronounced in respect to the vessel; and it is therefore probable, as intimated by counsel, that she has been restored on a compromise between the parties interested.

Before we proceed to the consideration of the principal questions which have been argued, it will be proper to notice several objections to the regularity of the allegations, proceedings and proofs in the cause.

It is, in the first place, asserted, on behalf of the Claimants, | that if this p. 284
should turn out not to be a case of enemy property, but of salvage merely, (as most certainly as to some of the claims it must be held to be) the re-captors can take nothing by the present libel, because it proceeds upon the mere footing of the property being prize of war. And it is likened to the case of a declaration at common law, where the party can only recover *secundum allegata et probata*; and if no count hit the precise case, the party must be non-suited.

If, indeed, there were any thing in this objection, it cannot, in any beneficial manner, avail the Claimants. The most that could result would be that the cause would be remanded to the Circuit Court with directions to allow an amendment of the libel. Where merits clearly appear on the record, it is the settled practice, in admiralty proceedings, not to dismiss the libel, but to allow the party to assert his rights in a new allegation. This practice so consonant with equity and sound principle, has been deliberately adopted by this Court on former occasions. After all, therefore, the Claimants would, in the language of an eminent civilian, but change postures on an uneasy bed.

But we are all of opinion that there is nothing in this objection. No proceedings can be more unlike than those in the Courts of common law and in the admiralty. In prize causes, in an especial manner, the allegations, the proofs and the proceedings are, in general, modelled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose. The Court of prize is emphatically a Court of the law of nations ; and it takes neither its character nor its rules from the mere municipal regulations of any country.

In cases of mere civil salvage, it may be fit and proper that the libel should distinctly allege and claim salvage, though we do not mean to assert that, even in such cases, it is indispensable. In cases of military salvage, also, the party may, if he please, adopt a similar proceeding. But it is by no means necessary, and, in most cases, would be highly inexpedient. Re-captures are emphatically cases of prize ; for the definition of prize goods is, that they are goods taken on the high seas, |
p. 285 *jure belli*, out of the hands of the enemy. When so taken, the captors have an undoubted right to proceed against them as belligerent property in a Court of prize : for in no other way, and in no other Court can the questions presented on a capture *jure belli* be properly or effectually examined. The very circumstance that it is found in the possession of the enemy, affords *prima facie* evidence that it is his property. It may have previously possessed a neutral or friendly character ; but if the property has been changed by a sentence of condemnation, or by such possession as nations recognize as firm and effectual, the neutral or friendly owner is forever ousted of his right.

It depends altogether upon future proceedings ; upon the examinations taken in preparatory and the documents on board ; upon the verity of the claims, and the diligence and good faith of the Claimants ; and upon the principles of international law, comity and reciprocity, whether a restoration can be decreed or not. How can these questions be decided, unless the customary proceedings of prize are instituted and enforced ? How can it be known whether all the documents on board be not colorable

and false, or whether the conduct of the Claimant be not unneutral or fraudulent, unless the truth is drawn from the parties intrusted with the property for the voyage, by the trying force of the standing interrogatories and the test affidavits ? The very case before us presents a strong illustration of the propriety of these proceedings. There is a large shipment on board, which, on the bill of lading, purports to be the property of an American Claimant ; yet the Claimant himself expressly swears that it is the sole property of the French shipper. What the consequences are of that fact will be presently seen.

The Court, then, has a legitimate jurisdiction over the property as prize ; and, having it, will exert its authority over all the incidents. It will decree a restoration of the whole or of a part ; it will decree it absolutely, or burthened with salvage, as the circumstances of the case may require : and whether the salvage be held a portion of the thing itself, or a mere lien upon it, or a condition annexed to its restitution, it is an incident to the principal question of prize, and within | the scope of the p. 286
regular prize allegation. If, therefore, the case stood upon principle alone, we should not doubt as to the sufficiency of the libel for this purpose ; but it has, also, the clear support of the practice of the admiralty. *The Aquila*, 1 *Rob.* 37. *The Franklin*, 4 *Rob.* 147. *The Jonge Lambert*, 5 *Rob.* 54, *note.*

Another objection urged on behalf of the captors, is to the sufficiency of the claims and test affidavits. It is asserted, and truly, that the goods are not alleged, in the claim or affidavits, to have belonged to the Claimants at the time of shipment ; it is only alleged that they so belonged at the time of capture. Regularly the test affidavit should state that the property, at the time of shipment and also at the time of capture, did belong, and will, if restored, belong to the Claimant ; but an irregularity of this nature has never been supposed to be fatal. It might, in a case of doubt or suspicion, or in a case calling for the application of the doctrine as to the legal effect of changes of property *in transitu*, have justified an order for further proof : or, in cases of gross negligence or pregnant fraud, have drawn upon the party more severe consequences. But in ordinary cases, it is not deemed to work any serious consequences : in this instance, it probably passed unnoticed in the Courts below, where if the blot had been hit, it might have been instantaneously removed by an amendment. Another irregularity undoubtedly was, that the test affidavits were put in, on behalf of many of the Claimants, by their agents, although the principals were resident in the U. States, and within the reasonable reach of the Court. Where the principal is without the country, or resides at a great distance from the Court, the admission of a claim and test affidavit by his agent, is the common course of the admiralty. But where the principal is within a reasonable distance, some-

thing more than a formal affidavit by his agent is expected. At least the suppletory oath of the principal as to the facts, should be tendered; for otherwise its absence might produce unfavorable suspicions. If, indeed, the principal might always withdraw himself from the view of the Court, and shelter his pretensions behind the affidavit of an innocent or ignorant agent, there would be no end to the impositions practised upon the Court. The Court expects, in proper cases, something more than the
p. 287 mere formal test | affidavit of an agent, who may swear truly, and yet, from his want of knowledge, be the dupe of cunning and fraud. It is not meant to assert that any such imputations belong to the present case. This irregularity, like the former, probably passed in silence; and it would be highly injurious if an objection of this sort should now prevail, when all parties have hitherto acquiesced in its immateriality.

We are now led to the principal question in this cause; viz. what rate of salvage is to be allowed to the re-captors? This depends upon the true construction of the salvage act of congress of 3d of March, 1800, ch. 14. That act provides, that, upon the re-capture of any vessel; (other than a vessel of war or privateer,) or of any goods belonging to any persons resident within or under the protection of the United States, the same, if re-captured by a private vessel of the U. States, shall be restored on payment of one sixth part of the value of the vessel or goods; and if the vessel, so re-captured, shall appear to have been set forth and armed as a vessel of war, before such capture, or afterwards, then upon a salvage of one half of the true value of such vessel of war.

It is argued, in behalf of the re-captors, that the Adeline being an armed vessel, they are entitled to a moiety of the value of *the cargo* as well as of the vessel; either upon an equitable construction of the statute, or upon general principles, as a case not within the purview of the statute.

We are all, however, of a different opinion. The statute is expressed in clear and unambiguous terms. It does not give the salvage of one sixth part of the value upon goods, *the cargo* of an unarmed vessel; but it gives it upon *any goods* re-captured, without any reference to the vehicle or vessel in which they are found. We cannot interpose a limitation or qualification upon the terms which the legislature has not itself imposed; and if there be ground for higher salvage in cases of armed vessels, either upon public policy or principle, such considerations must be addressed with effect to another tribunal. This decision affirms the decree of the Circuit Court as to the claims of all the parties domiciled in the United States. |
p. 288 As to the claims of the parties domiciled in France, whether natives or Americans, or other foreigners, their rights depend altogether upon the law of France as to re-captures; for by the act of congress, as well as by the general law, in cases of re-capture, the rule of reciprocity is to be applied. If France would restore in a like case, then are we bound to

restore; if otherwise, then the whole property must be condemned to the re-captors. It appears that by the law of France in cases of re-capture, after the property has been 24 hours in possession of the enemy, the whole property is adjudged good prize to the re-captors, whether it belonged to her subjects, to her allies, or to neutrals. We are bound, therefore, in this case, to apply the same rule; and as the property in this case was re-captured after it had been in possession of the enemy more than 24 hours, it must, so far as it belonged to persons domiciled in France, be condemned to the captors; and the decree of the Circuit Court as to them must be affirmed.

As to the claims of the other persons whose national character and proprietary interest do not distinctly appear, considering all the circumstances, we shall direct farther proof to be made on both points. As, indeed, the master has not been able to swear directly to the proprietary interest of the cargo, but simply says that the goods were, as he presumes and believes, the property of the shippers or the consignees, perhaps, in strictness, farther proof might have been required in the Courts below as to the whole cargo. It was not, however, moved for there by the captors; and as we are satisfied in relation to the claims which we shall restore, it would be useless now to make such a general order.

Upon these principles, the property embraced in the claims by and in behalf of Alexis Gardere, of William Weaver and Isaac Levis, jointly, and of William Weaver alone, of Andrew Byerly, of George I. Brown and William Hollins, of Peter A. Karthous, of William Bayard, Harman Leroy, James M'Evers and Isaac Iselm, of William Hood, of Theophilus De Cost, of John Duhany, of Messrs. John B. Fonssatt & Co. of Edward Smith, James Wood and Samuel W. Jones, of Victor Ardaillon, of Lewis Chastant, of Lewis Labat, of Benjamin Rich, of Nath'l. Richards, Nayah Taylor and Gustavus Upson, of | Ferdinand Hurxthal; must be restored on pay- p. 289
ment of the salvage of one sixth part of the value. The property embraced in the claims on behalf of Peter Boue, junr. of R. Henry, of P. Doussault, of William Johnston and James Dowling, of G. Brousse, must be condemned to the captors.

The remaining claims must stand for farther proof. And as to the property unclaimed, it must be condemned as good and lawful prize to the captors.

The decree of the Circuit Court is to be reformed so as to be in conformity with this decision.

The brig Alerta and cargo (Brosquet, claimant) v. Blas Moran, libellant.

(9 Cranch, 359) 1815.

The district Courts of the United States, (being neutral) have jurisdiction to restore to the original Spanish owner, (in amity with the United States) his property captured by a French vessel whose force has been increased in the United States, if the prize be brought infra præsidia.

March 10*th*. *Absent*....TODD, *J*.

THIS was an appeal from the sentence of the district Court, for the district of New Orleans, (which has the jurisdiction also of a Circuit Court.)

The facts of the case were stated by WASHINGTON, *J*. in delivering the opinion of the Court, as follows :

This is the case of a libel filed in the district Court of New Orleans, by Blas Moran, a subject of the king of Spain, and a native and resident of the island of Cuba, setting forth that he is the owner of the brig Alerta and cargo consisting of 170 slaves, which, on a voyage from the coast of Africa to the Havanna, was, sometime in the month of June, 1810, when within a few leagues of Havanna, captured on the high seas by the *L'Epine*, bearing French colors ; that a prize master was put on board the Alerta, and 17 of the slaves taken out, after which the prize was ordered to steer for the Balize, and was finally brought to the port of New Orleans, with the remainder of her cargo consisting of 153 slaves. The libel alleges that the L'Epine was not duly commissioned to capture the property of Spanish subjects, or, if so commissioned, that she was armed and equipped for war in the port of New Orleans, and manned by sundry American citizens and inhabitants of the territory of New Orleans, contrary to the law of nations. The prayer of the libel is for restitution and damages.

The claim of the prize master admits the capture of the Alerta as lawful prize of war ; and asserts that the L'Epine, at the time of the capture, was and still is legally authorized to capture all vessels and their cargoes belonging to the subjects of Spain, as enemies of France. He further states, that after the capture he was compelled to enter the
p. 360 port of New Orleans by stress of weather, | want of provisions, and the inability of the Alerta to keep the sea, and prays to be dismissed.

The evidence in the cause establishes the following facts. That sometime in April, 1810, this privateer commanded by captain Batigne, and bearing a commission from the French government, to make prizes on the high seas, entered the port of New Orleans. The captain had with him a letter of instructions from his owner, directing him to deposit what money he might take as prize in the Bank of New Orleans ; to

put into one of the ports as being in distress, and, in case he should hear of the capture of Guadeloupe, he was to renew his crew for the purpose of conveying his prizes to France. Sometime in the course of the succeeding month, Batigne presented two petitions to the collector of the port of New Orleans, stating that the L'Epine had been compelled by stress of weather to put into that port, and that he had necessarily incurred expenses for refitting and victualing the privateer, and for defending himself against a criminal prosecution for piracy to an amount exceeding $5000, and praying for permission to enter and sell such part of his cargo, as would enable him to discharge that sum. He also applied to the collector, about the same time for permission to purchase provisions for his crew amounting to thirty persons, on his intended voyage to France, and intimated that he should take with him about ten passengers, if permitted to do so; but this permission being refused, he professed to relinquish his intention of taking passengers on board.

Having obtained permission to purchase provisions, and to dispose of a part of his cargo, it appears that he paid off his crew, and sailed from New Orleans soon afterwards with a crew of from fifty to sixty men composed partly of persons obtained at New Orleans, and partly of those who had entered that port with him. With this force on board he went to sea, and soon afterwards fell in with the Alerta bound from Africa to the Havanna, which, together with her cargo consisting of 170 slaves, he captured as prize of war, put a prize master on board, and ordered her to steer towards the Balize. On her passage, the Alerta suffered very considerably in a gale; and her crew, together with the slaves on board, were much distressed for want of provisions, when she was, | at the request of captain Batigne, visited and relieved by captain p. 361
Allen, and conducted safely to New Orleans, where he libelled the vessel and cargo for salvage.

The Court below, upon the libel of the Spanish owner, decreed restitution to the libellant of the ship and the 154 slaves left on board of her by the privateer, subject to all expenses for the support of the negroes, and such salvage as should be decreed by the Court together with costs of suit, and such damages as the Court should thereafter decree.

J. WOODWARD, *for the Appellant*, contended for the following points.

1. That the authority to capture is complete and the capture in all respects legal and operative.

2. That it does not appear that the equipment of the *L'Epine* was in violation of any law of the United States, or in such manner as to affect the prize in question.

3. That there is error in the decree of the Court below in decreeing restoration to the libellant, *Blas Moran*.

4. That should it be the opinion of this Court that the *Alerta and*

cargo are not prize of war, the restoration should be subject to a salvage to the captors ;

And submitted the case to the Court, upon the following written argument.

In this case the Appellant will not controvert the jurisdiction of the Court to enquire as to the commission or authority under which the privateer acted, but will content himself with shewing that for all the purposes of this case the commission is regular.

There are no appearances which justify a presumption of fraud on the face of the commission. The Court will inspect it.

The district Court agrees that if the case stood on this point alone it would be left to the foreign tribunal. The official signatures are proven.

p. 362 The commission being | thus established, this Court will not go into a question of regularity which may or may not be material according to the local usage in the French ports as to issuing or using those commissions.

It appears by the captain's petition to the collector, which is sworn to, that he, the captain of the L'Epine, was tried at New Orleans on this transaction as a pirate, and I think the presumption must be that he was acquitted. The validity of his commission must have been passed upon, on this trial, for if he acted without commission he was a pirate. He cannot be looked upon as a pirate, because he has acted openly under the authority of at least a regularly executed commission, and in full communion with the consul of his own nation at New Orleans. If not a pirate he was a legal captor as far as respects the commission. But it is said that the equipment of the L'Epine, by force of which she made the capture in question, was contrary to the laws of the United States, and that therefore our Courts have a right to restore the prize. The inference of law may be true, but the fact is not established. Indeed it might not be indecorous to suppose, from a comparison of the testimony with the result in the Court below, that by possibility, clamor or prejudice, which too often insensibly intervene in such cases, had not been without their effect. The acting consul at New Orleans swears that the additional number of men went on board as passengers, that no money was paid to them and that if they were to have formed an augmentation of the crew he must have co-operated. The circumstances corroborate this fact, they were foreigners : they were emigrants. It does not appear in any instance that a person was taken on board as an addition to the crew. There might have been a difference between the number reported and the number on board, but it is also true that there were some secreted on board unknown to the captain until he got to sea. This is not an unusual case with respect to such vessels. But the testimony shews the conduct of the captain to have been honorable on this point. If after

leaving the jurisdiction of the United States any of those Frenchmen had entered into the service as foreigners, this is a crime personal to themselves and which cannot affect the privateer or her prize, unless by the captain's *original* procurement, he knowing them to be *American* citizens. Would the evidence, | which the Court will of course read, be p. 363
sufficient to establish the penalties under the act of congress? If not, it will not be sufficient to establish the forfeiture of vessel and cargo as against the captors whose possession I consider firm under the capture. The whole conduct of the captain has been in open day and under the express view of the collector. It must be presumed fair.

But it is said that the last entrance into the port of New Orleans was not in good faith. It is said that by the letter of instructions, &c. the L'Epine had an original intent to go into New Orleans to deposit cash in the banks there. This intent was contingent and remote and it does not appear that the contingency of getting cash had happened. But the original intent is immaterial, provided the distress were the true and immediate cause. I need not refer the Court to authorities under the navigation laws of England to decide this point, but if desired they can be produced. This intent might have been effected without a violation of our laws, as the money might have been sent in without the vessel. But this charge of original intent is contradicted by the fact, as the L'Epine passed frequently with a fair wind when she might have entered, and did not, but kept at broad capturing distance, 80 miles from the Balize although there were no enemy ships to prevent her entering the port.

If the Court should be of opinion, contrary to the crude reasoning now submitted, that the Alerta and cargo ought of right to be restored, then it appears to me that the captors are entitled to salvage, and not Mr. Allen, the pilot, as a condition precedent to the restoration. The deposition of Allen himself will shew that when he, for the first time, boarded the Alerta, she was within a day of Barrataria, had weathered the storm of the 26th, was riding in a calm sea at anchor, 12 feet water, and the crew amusing themselves in catching sea birds, and supplying themselves by salting them, of which they had several barrels. She had plenty of provisions at that time to carry her to Barrataria, and Allen states that she could have gotten there, but had a *storm* happened he should not have liked to have risked himself in her. But as to the L'Epine she overtook the Alerta in actual distress after she had been recently cast on shore and greatly injured, with but half a barrel of bread, half a barrel of pork, | for 150 slaves and 12 other persons, and p. 364
indeed the L'Epine, was visited by Mr. Martinez from the Alerta on account of this distress. The testimony shews that she could not have reached a harbor but for the aid from the L'Epine. Then unless the act

of bringing in the Alerta were piratical, the L'Epine acted as humanely and as beneficially to the owners in bringing in the Alerta as in any other case of salvage.

There was no argument on the part of the Appellee.

March 10. *Absent*....TODD, *J.*

WASHINGTON, *J.* delivered the opinion of the Court as follows :

The only question for the consideration of this Court is, whether the Court below had jurisdiction of this cause for the purpose of restoring the property to the Libellant ? The jurisdiction is asserted upon two grounds.

1. That the force of the privateer, by means whereof this capture was made, had been increased at New Orleans, contrary to the laws and in violation of the neutrality of the United States.

2. That the commission of this privateer had expired before the capture was made.

As this Court is satisfied with the sentence of the Court below upon the first ground of jurisdiction, the opinion will be confined to that point. The general rule is undeniable, that the trial of captures made on the high seas, *jure belli*, by a duly commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the Courts of that nation to which the captor belongs. To this rule there are exceptions which are as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country into which the prize is brought, or by a privateer which had been illegally equipped in such neutral country, the prize Courts of such neutral country not only possess the power, but it is their duty to restore the property so illegally captured to the owner. This is necessary to the vindication of their own neutrality. |

p. 365 A neutral nation may, if so disposed, without a breach of her neutral character, grant permission to both belligerents to equip their vessels of war within her territory. But without such permission the subjects of such belligerent powers have no right to equip vessels of war, or to increase or augment their force, either with arms or with men, within the territory of such neutral nation. Such unauthorized acts violate her sovereignty and her rights as a neutral. All captures made by means of such equipments are illegal in relation to such nation, and it is competent to her Courts to punish the offenders, and, in case the prizes taken by her are brought *infra præsidia*, to order them to be restored.

These principles are believed to be fully warranted by the general law of nations, by the decisions of the Courts of this country, and by the laws of the United States. By the act of June, 1794, the enlisting, within the territory of the U. States, persons to serve as soldiers and marines on board of any vessel of war or privateer in the service of any foreign state, with the exception of the subjects of such foreign state

transiently within the United States; the fitting out and arming any vessel in the service of a foreign prince or state at war with any other nation which is at peace with the United States; and the increasing or augmenting the force of any armed vessel of war in such foreign service, by adding to the number of her guns, and the like; are declared to be offences against the United States, and are punishable by fine and imprisonment; and the 7th section of the law provides for the detention of all such vessels as have been so fitted out, or as have so increased or augmented their force, together with such prizes as they may have made, in order to the execution of the prohibitions and penalties prescribed by that act, and to the restoring of such prizes in cases where restoration shall have been adjudged.

Thus, if there were any doubt as to the rule of the law of nations upon this subject, the illegality of equipping a foreign vessel of war within the territory of the United States, is declared by the above law; and the power and duty of the proper Courts of the United States, to restore the prizes made in violation of that law, is clearly recognized. |

But it is insisted for the claimant in this case, that the persons taken p. 366
on board at New Orleans by the captain of the privateer, formed no part of the crew at the time the privateer left that port, but that they were received merely as passengers; that they were emigrants from other nations, and not citizens of the United States; and that their subsequent change of character from passengers to crew, cannot attach any crime to the captain of the privateer under the laws of the United States, or affect his right to the prizes which he might afterwards make on the high seas.

This argument is unsupported by the facts proved in the cause. It appears that capt. Batigne proposed, in the first instance to the collector of the port of New Orleans, to take on board ten passengers for France, provided he should be permitted to do so, and that he afterwards stated to the collector that as there was some difficulty in obtaining such permission he should decline taking them. But what places this subject beyond all doubt is, that it appears from some of the ship's papers of the privateer that advances were made to these alleged passengers with a deduction of 3 per cent. for the marine invalids agreeably to the ordinances of France, and the *role d'equipage* contains the number of prize shares opposite to their names. These facts, being unexplained by any testimony in the cause which deserves to be respected, leave no doubt that the persons taken on board at New Orleans were engaged originally as an addition to the crew of the privateer. Some of the persons so enlisted are proved to be native citizens; others were residents domiciled in New Orleans, some with and others without families; and others again were slaves belonging to the citizens of that place, who appear to have been seduced from the service of their masters. It

is quite immaterial whether the persons so enlisted were native American citizens or foreigners domiciled within the United States; since neither the law of nations nor the act of congress recognizes any distinction except in respect to subjects of the state in whose service they are so enlisted, transiently within the United States; and it may well be doubted whether this exception in the act of congress was not virtually repealed by the non-intercourse law. But it appears that some of these
p. 367 persons | were emigrants from Cuba, and were, at that time, residing and domiciled in New Orleans.

It is next contended on behalf of the Claimant, that, in case the Court should affirm the decree directing restitution, it ought to be done upon the condition of the Libellant paying salvage, not to the captain of the gunboat who furnished the Alerta with provisions and conducted her to New Orleans, but to the privateer.

This claim is entirely inadmissible. Salvage is allowed as a reward for the meritorious conduct of the salvor, and in consideration of a benefit conferred on the person whose property he has saved. What are the pretensions of captain Batigne to the reward he claims? He fits out his vessel at New Orleans in contravention of the law of nations and of the United States; and finding on the high seas a vessel and cargo, belonging to the subjects of a nation at peace with the United States, within a short distance of the Havanna, her port of destination, he employs the force thus illegally taken on board to make prize of both vessel and cargo, and taking her out of her course, he conducts her towards the Balize, near to which she is found by captain Allen in distress in consequence of a severe gale, to which she had been exposed, and of the want of provisions. Her wants being relieved by that officer, he conducted her in safety to New Orleans. Nothing could be more remote from the intentions of the captain of the privateer than to render a service to this ship and her cargo. So far from it, he committed an unwarrantable spoliation of the cargo by selling fourteen of the slaves, part thereof, to an American whom he met at sea; and he most certainly intended to have smuggled the residue of the slaves into Grand Terre or some other part of the coast, and there to have disposed of them. It would ill become any Court of justice, and much less an American Court, to bestow a reward on a person who had thus violated the laws of the United States in one instance, and meditated a violation of them in another: and it would be still worse to give such reward at the expense of the injured Spaniard.

Upon the whole, it is the opinion of this Court that the sentence appealed from ought to be affirmed with costs.

The Grotius.—Sheafe, master.

(9 Cranch, 368) 1815.

In order to constitute a capture, some act should be done indicative of an intention to seize and to retain as prize; it is sufficient if such intention is fairly to be inferred from the conduct of the captor.

March 10*th*. *Absent*....TODD, *J*.

THIS case was continued from last term, for further proof, (*See* 8 *Cranch*, 456) and was now submitted, upon the further proof produced, without argument.

WASHINGTON, *J*. delivered the opinion of the Court as follows:

This case comes before the Court upon an order for further proof, made at the last session in relation to the validity of the alleged capture of this vessel. The master, the mate and two of the seamen of the Grotius, in answer to some of the standing interrogatories, swore, that they did not consider the ship to have been seized as prize, and that the young man who was put on board by Odiorne, the captain of the privateer, was received and considered as a passenger during the residue of the voyage. The deposition of *Very*, the alleged prize-master, was taken and read in the Court below, in which he swore that he was present at the capture; that Sheafe, the master of the Grotius, was ordered to go on board the privateer with his papers, and that he, Very, was directed by captain Odiorne, in the presence of Sheafe, to go with the prize, as prize-master, and to permit the captain of the Grotius to keep possession of the ship's papers and to navigate her into port. That he accordingly went on board as prize-master taking with him a copy of the privateer's commission and also written instructions from captain Odiorne for his own conduct.

The deposition of Very, though irregularly taken in that stage of the cause, was nevertheless calculated to weaken the preparatory evidence in relation to this contested fact, and to point out the propriety of a further investigation. The evidence of this witness lost much of its weight from the circumstance that his letter of instructions was not annexed to his deposition, or made an exhibit in the cause. It was proper that this omission should be supplied by the captors, if it could be done, and that they should have an opportunity to fortify the | evidence p. 369
of Very, if in their power to do so. For these reasons the order for further proof, was extended as well to the captors as to the Claimants. Under this order the captors have exhibited an attested copy of the written instructions to Very, bearing date the 29th of July, 1813. They inform him that he is put on board the Grotius and direct him to proceed in the ship, and, on his arrival, to report himself to the agent of the privateer who would take such measures as he might deem necessary; that he

is not to take charge of the vessel, but is to allow the captain to take her into any port in the United States he might see fit. The authenticity of this paper is ascertained by the affidavit of the prize agent of the privateer, in which he swears that the original was delivered to him by Very, on his arrival, as containing his orders, and that it has remained ever since in his possession. The deposition of Very has not been taken under the order for further proof, but the omission is accounted for by the prize agent, who, in his affidavit, swears that Very was captured on a subsequent voyage, and had not since returned to the United States. Under these circumstances the Court feels no difficulty in receiving his deposition originally taken in the Court below. In addition to the letter of instructions to Very, the collector of the port of Portsmouth has furnished an extract from the journal of the privateer, kept on that cruize, which states 'that on the 30th of July, 1813, the Grotius was boarded, 'and after an examination of her papers, a prize-master was put on board 'of her, and she was ordered to the first port in the United States.'

This documentary evidence is further supported by the deposition of Mr. Wardwell, the surgeon of the privateer, who swears that captain Odiorne informed the master of the Grotius, after he had come on board, that he should make out a copy of his commission and should put a prize-master on board, to whom he should give orders to suffer captain Sheafe to conduct his ship into any port of the United States he should think fit; that he would be further instructed to report to the custom house on his arrival, and to inform the agent of the privateer of his arrival. That a prize-master, named Very, was accordingly placed on board, with instructions and a copy of the commission. This witness
p. 370 being examined | as touching his interest in this cause, swears that he has none, having for a valuable consideration assigned all his interest in the prize to the owners of the privateer. The only evidence given by the Claimants under the order for further proof is the deposition of John de Forest and the affidavit of captain Sheafe, which corresponds with his answers to the standing interrogatories; and in addition thereto he contradicts the material parts of Wardwell's testimony. De Forrest was a passenger on board of the Grotius, and he swears that Very exercised no authority whatsoever on board that ship, but was considered and treated as a passenger.

Upon this evidence and the answers to the standing interrogatories, the cause is now to be decided; and the only question is whether the Grotius was in fact seized as prize of war. When the facts are ascertained there can be very little doubt what constitutes in law a valid seizure as prize. It is clear that some act should be done indicative of an intention to seize and to retain as prize; and it is always sufficient if such intention is fairly to be inferred from the conduct of the captor. Now in this

case, the evidence of Very and of Wardwell, proving that captain Sheafe was distinctly informed that his ship would be sent in as prize, is corroborated by the written instructions to the former, which he delivered, on his arrival, to the prize agent, and by the journal of the privateer, both of which documents correspond with the evidence of those witnesses. The former of these documents, written at the time when Very was appointed the prize-master as he states, imports a clear declaration of the intention of captain Odiorne, and having been deposited, with the prize agent immediately on the arrival of the Grotius, it cannot be presumed to have been fabricated to serve the purpose for which it is now used.

Although the instructions do not call Very prize-master by name, yet they contain other equivalent expressions; for if he was put on board merely as a passenger, what had he to do with reporting the vessel, on her arrival to the collector, and particularly to the prize agent? |

The evidence then on the part of the captor would be quite sufficient p. 371
to establish the fact of a valid capture if it stood uncontradicted. The only positive evidence against it, is the deposition of Sheafe, which is in direct opposition to that of Wardwell and Very. He swears that Odiorne represented himself in the first instance as the commander of a British privateer, and as such threatened to put a prize-master on board and send him into Halifax. That he afterwards avowed his real character, after which he never spoke of putting a prize-master on board, but merely requested him to receive Very as a passenger. He says that the first conversation when Odiorne spoke of putting a prize-master on board took place in the cabbin when Wardwell was present; that the latter conversation was on deck when he was not present.

Wardwell is equally positive. He swears that after captain Odiorne had disclosed his real character, he told Sheafe that he should put a prize-master on board, and send him into any port in the United States he might chuse, adding that he might as well be prize to the privateer as be seized by the government of the United States on his arrival; to which captain Sheafe assented. He further swears that captain Odiorne informed the captain of the Grotius, that he should direct the prize-master to report himself to the custom house, and to the prize-agent. In point of credit these witnesses appear to be equal, neither of them having any personal interest in the dispute. But Wardwell is fully supported by Very and their united testimony receives considerable aid from the instructions, and from the journal of the privateer. They are also supported in some degree by the answer of Chambers, one of the crew of the Grotius, to one of the standing interrogatories, in which he states that Very, the day after his coming on board of that ship, declared that he was put on board as prize-master.

The evidence of the mate, of de Forest, and of Prince, is entitled to very little weight, because the two former did not go on board of the privateer, and the latter, although he did accompany captain Sheafe to the privateer, does not pretend that he heard any conversation between him and captain Odiorne; and being a common seaman it is unlikely that he should have been admitted into their company. The
p. 372 evidence of these persons as | to the unassuming conduct of Very whilst on board the Grotius, from which they inferred that he was there merely as a passenger, is entirely consistent with the arrangement proved to have been made on board of the privateer that he was not to interfere in the navigation of the vessel.

Upon the whole it is the opinion of a majority of the Court that the validity of the capture of the Grotius as prize of war is sufficiently established by the evidence, and the captain having acquiesced in the subsequent arrangement as to the mode of sending in the vessel, she ought to have been condemned to the use of the captors.

The decree of the Circuit Court condemning the ship Grotius, &c. to the United States is reversed; and the Court proceeding to give such decree as the said Circuit Court ought have given, it is further decreed and ordered that the said ship be condemned as lawful prize to the captors.

The Brig Concord.—Taylor, master.

(9 Cranch, 387) 1815.

If captured goods, claimed by a neutral owner, be by consent sold under an order of the Court, and afterwards by the final sentence of the Court, the proceeds are ordered to be restored to such owner, the amount of the duties due to the U.S. upon the importation of the goods must be paid.

March 11*th*. *Absent*....Todd, *J*.

This was an appeal from the sentence of the Circuit Court, affirming that of the District Court, which restored to the Claimants, neutral Spanish merchants at Teneriffe, 20 pipes of wine, part of the cargo of the British brig Concord, captured by the American privateer Marengo, in August, 1812, *without payment of duties*; although the same had been, by consent of the proctors for the parties, sold under an order of the Court.

The cause being submitted without argument;

Story, *J*. delivered the opinion of the Court, as follows:

This is the case of a shipment made by a neutral house on board of a British ship which was captured, on a voyage from Teneriffe to London, by the private armed ship Marengo, and brought into the port of New |
p. 388 York for adjudication. Pending the prize proceedings, the goods were sold by an interlocutory order of the District Court, and the proceeds

brought into the registry. Upon the hearing, the property was decreed to be restored to the claimants without payment of duties; and this decree was afterwards affirmed in the Circuit Court. The cause has been brought, by appeal, to this Court for a final decision.

We are all of opinion that the proprietary interest of the claimants is completely proved; and therefore the decree of restoration must be affirmed.

With respect to the duties, we are all of opinion that the decree of the Courts below was erroneous. Where goods are brought by superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported, in the sense of the law, as necessarily to attach the right to duties. If, however, such goods are afterwards sold or consumed in the country, or incorporated into the general mass of its property, they become retro-actively liable to the payment of duties. In the present case, if the goods had been specifically restored, and afterwards withdrawn from the United States by the Claimants, they would have been exempt from duties. But having been sold, by order of the Court, for the general benefit, the duties indissolubly attached, and ought to have been deducted from the proceeds by the Courts below. The decree in this respect must be reversed.

The Nereide.—Bennett, master.

(9 Cranch, 388) 1815.

The stipulation in a treaty, 'that free ships shall make free goods,' does not imply the converse proposition that 'enemy ships shall make enemy goods.' The treaty with Spain does not contain, either expressly or by implication, a stipulation that enemy ships shall make enemy goods. The principle of retaliation, or reciprocity, is no rule of decision in the judicial tribunals of the U. States.

A neutral may lawfully employ an armed belligerent vessel to transport his goods, and such goods do not lose their neutral character by the armament, nor by the resistance made by such vessel, provided the neutral do not aid in such armament or resistance, although he charter the whole vessel, and be on board at the time of the resistance.

*March 6th. Absent....*TODD, *J.*

THIS was an appeal by *Manuel Pinto*, from the sentence of the Circuit Court for the district of New York, affirming (*pro forma*) the sentence of the District Court which condemned that part of the cargo which was claimed by him.

The facts of the case are thus stated by the chief justice in delivering the opinion of the Court. |

Manuel Pinto, a native of Buenos Ayres, being in London, on the 26th of August, 1813, entered into a contract with John Drinkald, owner of the ship '*Nereide*,' whereof William Bennett was master, whereby the p. 389

said Drinkald let to the said Pinto the said vessel to freight for a voyage to *Buenos Ayres* and back again to London, on the conditions mentioned in the charter party. The owner covenanted that the said vessel, being in all respects sea-worthy, well manned, victualed, equipped, provided, and furnished with all things needful for such a vessel, should take on board a cargo to be provided for her, that the master should sign the customary bills of lading, and that the said ship being laden and dispatched, should join and sail with the first convoy that should depart from Great Britain for Buenos Ayres: that on his arrival the master should give notice thereof to the agents or assigns of the said freighter, and make delivery of the cargo according to bills of lading; and that the said ship, being in all respects sea-worthy, manned, &c. as before mentioned, should take and receive on board at Buenos Ayres all such lawful cargo as they should tender for that purpose, for which the master should sign the customary bills of lading: and the ship being laden and dispatched, should sail and make the best of her way back to London, and on her arrival deliver her cargo according to the bills of lading. For unloading the outward and taking in the homeward cargo, the owner agreed to allow 90 running days, and for unloading the return cargo 15 running days. The owner also agreed that the freighter and one other person whom he might appoint should have their passage without being chargeable therefor. In consideration of the premises the freighter agreed to send, or cause to be sent along side of the ship, such lawful goods as he might have to ship, or could procure from others, and dispatch her therewith in time to join and sail with the first convoy, and on her arrival at Buenos Ayres to receive the cargo according to bills of lading, and afterwards to send along side of the ship a return cargo and dispatch her to London, and on her arrival receive the cargo according to bills of lading, and to pay freight as follows, viz. for the outward cargo 700*l.* together with five per cent. primage, to be paid on signing the bills of lading, and for the homeward, or return cargo, at the rate mentioned in the charter party.
p. 390 He was also to advance the master at | Buenos Ayres, such money as might be necessary for disbursements on the ship. It was provided that all the freight of the outward cargo, except on the goods belonging to the freighter, which should not exceed 400*l.* should be received by the owner on the bills of lading being signed; and in case of the loss of the ship such freight should be his property; but if she arrived safe back with a full cargo, then the freighter should be credited for the excess of the said freight over and above the sum of 700*l.* A delay of 10 running days over and above the time stipulated is allowed the freighter, he paying for such demurrage at the rate of 10*l* 10*s* per day.

Under this contract a cargo, belonging in part to the freighter, in part to other inhabitants of Buenos Ayres, and in part to British subjects, was

taken on board the Nereide, and she sailed under convoy some time in November, 1813.

Her license, or passport, dated the 16th of November, states her to mount 10 guns and to be manned by 16 men.

The letter of instructions from the owner to the master is dated on the 24th of November, and contains this passage: 'Mr. Pinto is to advance 'you what money you require for ship's use at River Plate, and you will 'consider yourself as under his directions so far as the charter party 'requires.'

On the voyage, the Nereide was separated from her convoy, and on the 19th of December, 1813, when in sight of Madeira, fell in with, and after an action of about fifteen minutes, was captured by the American privateer 'The Governor Tompkins.' She was brought into the port of New York, where vessel and cargo were libelled; and the vessel and that part of the cargo which belonged to British subjects were condemned without a claim. That part of the cargo which belonged to Spaniards was claimed by Manuel Pinto, partly for himself and partners, residing in Buenos Ayres, and partly for the other owners residing in the same place. On the hearing, this part of the cargo was also condemned. An appeal was taken to the Circuit Court, where the sentence | of the District Court p. 391
was affirmed, *pro forma*, and from that sentence an appeal has been prayed to this Court.

HOFFMAN, *of New York, for the Appellant.*

It is true this vessel was armed, but Pinto had no agency in arming her. She was an armed vessel as early at least as May, 1811, before the war between the United States and Great Britain. It is true she sailed with convoy, but this she was obliged by law to do. It is true also that she resisted the capturing vessel; but neither Pinto, who was a passenger on board, nor any other neutral passenger, gave any aid in the engagement.

The claim of Pinto, in behalf of himself, his father and sister, who were jointly interested with him in the business which he carried on in his own name, was of three descriptions of goods.

1st. Of goods of which they were the sole owners.

2d. Of goods of which they owned one undivided moiety, the other being owned by British merchants.

3d. Of goods in which they claimed an interest of one-fourth, the residue being British property

As to this last claim he is charged with *mala fides*, because in his examination *in preparatorio* he stated without qualification that he was the owner of one-fourth part of those goods, whereas in his claim and test affidavit he states the fact to be that he had agreed with certain British merchants, that if they would give him 10 per cent. upon the sales, he

would select for them such goods as would sell, at Buenos Ayres, at an advance of 150 per cent. upon their cost and charges; that he selected these goods under that contract; that his commissions would have amounted to one-fourth of the original cost, and to that extent he believed himself interested therein.

There was no attempt to impose upon the Court, he voluntarily explained the nature of his interest; if he was mistaken as to the legal effect of such a contract, yet no improper motive can be attributed to him. |

p. 392 Neither Pinto, nor any person connected with him, joined in the battle. If he had done so, he might have been considered as taking part in the war, and thereby excluding himself from the protection to which he is now entitled by the law of nations. He remained in the cabin during the whole engagement, and had no concern whatever in the defence of the ship. It is true that he states upon his examination *in preparatorio,* ' that ' he belonged to the ship at the time of her capture, and had control of ' said ship and cargo.' But his answers were written by the commissioner, and he being a foreigner, probably did not observe the force of the expression. The nature of his control is explained by all the other circumstances of the case to be a control within the limits of the charter party. It is evident he could have no lawful control over the management of the ship from the time of her sailing from London until her arrival at Buenos Ayres. The letter of instructions from the owner of the ship to the master, shows that the master was under the direction of Pinto *so far only as the charter party required.*

It has been heretofore said that Pinto had acquired a hostile character arising from domicil. There is, however, no ground for such a pretence. It is true that in the charter party he is said to be ' of Buenos Ayres, *but* ' *now residing in the city of London;* ' and in his examination *in preparatorio,* he states ' that for seven years last past he has lived and resided ' in England and Buenos Ayres.' But he at the same time states that he is a native of Buenos Ayres, that he now lives there, and has generally lived there for 35 years, and has been admitted a freeman under the new government of Buenos Ayres. Even if he had acquired a domicil in England, which is not true, yet he had turned his back on that country and was on his voyage home. 5 *Ves. Jun.* 787, *Somerville v. Somerville.* Pinto's test affidavit shows particularly that his birth, residence, and commercial establishment had always been at Buenos Ayres, except during his occasional temporary absences in his commercial pursuits. The test affidavit is always good evidence in prize causes. The party is obliged to put in his claim upon oath, and it is to be taken as true until contradicted by better evidence. |

p. 393 The Court is now for the first time called upon to decide the question

whether neutral property forfeits its character of neutrality by being put on board an *armed* ship of the enemy ?

The general rule is that the property of a friend in a hostile vessel is not liable to condemnation.

There are but two exceptions to the neutral right to trade.

1. He shall not carry contraband of war.

2. He shall not violate a blockade.

If the sailing in an *armed* vessel of the enemy had been also an exception, it would unquestionably have been noticed by some writer upon the law of nations. But no such exception is to be found in the books.

If such be the doctrine, what degree of force will be sufficient to forfeit the neutral character of the goods ? If she carried a single musket, the principle must be the same as if she mounted fifty cannon. And sailing under convoy would be still more clearly within the rule.

Vattel, b. 3, *c.* 5, § 75, lays down the general principle thus : 'Since 'it is not the place where a thing is, which determines the nature of that 'thing, but the quality of the person to whom it belongs ; things, belong-'ing to neutral persons, which happen to be in an enemy's country, or the 'enemy's ships, are to be distinguished from those belonging to the 'enemy.'

No hint is given that a distinction is to be taken between the armed and unarmed ships of the enemy. Again in *b.* 3, *c.* 7, § 116, he says, 'the 'effects of neutrals found in an *enemy's ship*, are to be restored to the 'owners, against whom there is no right of confiscation.' See also *Duponceau's Bynkershoek*, 102, 108. 2 *Azuni*, 194. *Chitty*, 111. *Ward*, 21. *Mr. Jefferson's* letter to *M. Genet*, 24th January, 1793, among our own state papers, in the department of state.

This Court will not, in contradiction to all these authorities, | make p. 394
a new exception to the rights of neutral commerce. The policy of this country is to extend, not to impair them. A neutral aids the belligerent much more by carrying belligerent property, than by employing a belligerent vessel to carry neutral goods ; yet the neutral vessel carrying the belligerent goods, is always restored, and with freight, unless she forfeit her neutral character by her hostile conduct. The neutral character may be forfeited by fraudulent conduct of the master—by violation of blockade —by carrying contraband goods—by false destination and by resisting search. These are the only exceptions to the general rule that the property of a friend must be restored. But there must be an actual or an implied connivance between the master of the vessel, and the neutral owner of the goods in order to subject the neutral cargo to condemnation for the acts of the master. 1 *Rob.* 67, (*Am. ed.*) *the Mercurius. Id.* 130, *the Columbia. Id.* 277, *the Jonge Tobias.* 5 *Rob.* 234, *the Shepherdess*,

In the case of *the Maria* (*the Swedish convoy*) the merchant vessels had received orders from the convoy to resist search.

The unneutral character of a master shall not forfeit neutral property on board a neutral vessel. Can you then punish the innocent neutral for the legal exercise, by the hostile master of a belligerent vessel, of his rights of war ?

If this property is to be condemned, it must be on the ground of *resistance* ; for it is understood that it has been decided by this Court that shipping neutral property on board an armed *neutral* vessel even, will not subject it to condemnation. If *resistance* be not the ground on which condemnation is claimed, then in a case where no resistance is made, if neutral property be found on board an enemy's ship armed merely for resisting the piratical boats of South America, it is liable to condemnation.

It is true that a neutral cannot lawfully rescue his ship captured by a belligerent, because he has redress by the law of nations if he has been improperly captured. 3 *Rob.* 227 (*Am. ed.*) *the Dispatch.* 1 *Rob.* 287, *the Maria.* But here the force was not used by a neutral. The ship owner and the master were open and avowed enemies, and as such had a perfect right
p. 395 to defend their | ship by force. It was a lawful force. 5 *Rob.* 206, *Catharina Elizabeth.*

But it will be said that the right to search is impaired.

The right of search is applicable only to a *neutral* ship. In case of a belligerent ship, the right of search is superseded by the right of capture. The privateer had a right to capture the Nereide, but, strictly speaking, had no right to search her. Pinto, by placing his goods on board a hostile ship, made them certainly liable to *capture*, although not to condemnation. He gave us the right of capture in lieu of the right of search.

The putting of neutral goods on board an armed vessel of the enemy, is analogous to the placing them in a fortified town. If they are placed there before investment, they are not liable to condemnation, if captured ; but if placed there after investment they *are* liable.

But it will be contended that the fifteenth article of the treaty of 1795, between Spain and the United States, (*Laws of the United States, vol.* 2, *p.* 526,) has altered the rule of the law of nations on this subject, and that neutral Spanish goods found on board an enemy's ship are liable to condemnation as enemy's goods.

The words of the article are, ' And it is hereby stipulated that free ships ' shall also give freedom to goods ; and that every thing shall be deemed ' free and exempt which shall be found on board the ships belonging to ' the subjects of either of the contracting parties, although the whole ' lading, or any part thereof, should appertain to the enemies of either ; ' contraband goods being always excepted.'

It will be contended, that if free ships make free goods, enemy's ships must make enemy's goods.

But we contend, that although by the treaty free ships make free goods, yet the rule of the law of nations still remains in full force, that free goods found in an enemy's ship are also free. Nothing but an express stipulation in a treaty can deprive the Spanish subject of his rights under the law of nations. The treaty contains no such express stipulation. The article stipulated does | not necessarily imply its converse. The two p. 396
rules are not inconsistent with each other. The neutral nation is entitled to the benefit of both. *Ward*, 145.

In some of our treaties will be found express stipulations as to both points; in others as to one of the points only; which fact shows that the two propositions are not considered as inseparable. The treaty of 1782, with Holland, adopts both rules—free ships are to make free goods, and hostile ships, hostile goods. So also does the convention of 1800 with France. 6 Cranch, *appendix, p.* 22.

As to the Spanish ordinance of Spain, *cited in* 2 *Azuni*, 139, which declares even the goods of Spanish subjects to be good prize if found on board an enemy's ship, it is a mere municipal regulation and does not appear to have been adopted in practice against the citizens of the United States, even if it were in its terms applicable to them.

It is said that Spain would condemn our goods found on board her enemy's ships, and therefore, upon the principle of reciprocity, we ought to condemn her goods found on board the ships of our enemy. But the principle of reciprocity applies only to the case of salvage. It is not a rule of the law of nations as to prize of war.

The proprietary interest of Pinto, his father and sister, and of the other merchants of Buenos Ayres in whose behalf he has interposed a claim, cannot be disputed. Their national character is clearly made out. The goods are not liable to forfeiture, either on account of his residence in London, or the character of the ship, or the opposition which she made, or by the treaty of Spain, or the principle of reciprocity. They ought therefore to be restored; and without payment of the duties, inasmuch as it was not a voluntary importation.

DALLAS, *contra, for the captors*,

Contended, that there was evidence tending to show that Pinto, had caused the ship to be armed, and had caused sundry British passengers to be taken on board, some of whom fought in the battle. That he had acquired | p. 397
a British character by domicil; and that he had not renounced that character by turning his back on England, inasmuch as he meant to return.

That Pinto must be considered as the owner of the vessel for the voyage, and as having a control over her in regard to her resistance.

He admitted that neutrals have a right to carry on their accustomed trade in the usual manner, and to employ the merchant vessels of the enemy for that purpose; but not to arm a hostile vessel, nor to hire a hostile vessel already armed.

He divided his argument into three points:

1. That the property cannot be restored without further proof, both on the subject of domicil and on that of proprietary interest. And that, under the circumstances of this case, Pinto is not entitled to time for further proof.

2. That by force of the treaty between Spain and the United States, taken in connexion with the existing law of Spain, the property is liable to condemnation.

3. That a neutral cannot lawfully hire an armed vessel of our enemy, and in the course of that trade engage in battle with the United States.

1. As to further proof respecting his domicil.

In his examination *in preparatorio* he states, that for the last seven years he resided in England and Buenos Ayres. This fact stood unexplained upon the record for nearly a month. He then states in his test affidavit that he was then a resident of Buenos Ayres, where he had generally resided for 35 years; but says nothing in explanation of his former assertion, that he had resided the last seven years in England and Buenos Ayres. Why did he not state how long he had resided in each place? This leaves a doubt, which the Court would permit him to explain, if he stood fair in Court. The charter party also states him to be then a resident in England. |

p. 398 Then as to his proprietary interest, he first swears that he is the sole owner; but afterwards contradicts himself, and says he made a mistake, and that his father and sister are jointly interested with him in the property. Again, he first states the printing apparatus to be his property, and afterwards admits that it belonged to British subjects.

With regard to the one-fourth which he claimed of sundry parcels of goods, he first swears that it belongs to him absolutely, and afterwards states that he was only entitled to a commission upon the sales of them. So also with regard to an invoice of buttons, he first claimed them as his own, and afterwards disclaimed them as British property.

Again his testimony is contradicted by *Puzey*, his confidential clerk, who testifies that part of the property claimed by Pinto, belonged to the government of *Buenos Ayres*.

It is certain then that the evidence is not clear in his favor, as to his domicil, and as to his proprietary interest.

Is he entitled to further proof?

He has hired an armed vessel of the enemy which has fought an

American vessel, and would have captured her if she had been able. There is no case in which restitution has been awarded under such circumstances. Suppose an American frigate had captured a British frigate laden with specie belonging to the Spanish government, would it have been restored? How was it in the case of the Peacock and the Epervier?

Pinto chartered the whole ship. He permitted every thing to be put on board; the hostile property as well as the neutral. He was to receive freight for the hostile property, and a higher freight on account of the armament. He knew that if this armament was employed to protect the neutral property it would protect the hostile also. He impliedly undertook that the enemy's property should be protected. He was therefore interested in so doing, and identified his interest with that of the belligerent. The armament was clearly intended to be used against the Americans, as all the cruizers of France | had been driven from the ocean, p. 399
and never appeared in those southern latitudes.

He says in his examination that he was interested in the vessel and cargo and freight; and in a subsequent answer he states that he had the control of the ship and cargo. It is clear therefore that he participated in the belligerent character, and is not entitled to further proof. *See* 6 *Rob.* 460, *the Atlantic.*

2. As to the effect of the Spanish treaty, in connexion with the existing law of Spain.

The treaty says that 'free ships shall make free goods.' This implies the converse proposition that hostile ships shall make hostile goods.

This treaty followed the memorable discussion which took place between this government and *Genet,* in 1793. At that time we had a treaty with Prussia, (2 *Vol. Laws U. S.* 308, *art.* 12.) which contains the same stipulation that free ships shall make free goods; but is silent as to the converse proposition. The two treaties are to be construed alike. *Genet* complained that we permitted the British to take French goods out of our vessels. Mr. Jefferson was one of the negotiators of that treaty, and it is clear that he understood it as implying that enemy ships should make enemy goods. See his letters as secretary of state to Mr. *Genet,* of 24th July, 1793, and to Mr. Morris of the 16th of August, 1793. The administration of our government constituted, at that time, perhaps as wise a cabinet as ever existed. This treaty was their act. The proper construction must be that the converse rule is implied. *Ward,* 144, 145.

But when the treaty is taken in connexion with the existing law of Spain at the time of making the treaty, there can be no doubt. By that law enemy ships make enemy goods. 2. *Azuni* 139. The Mr. Debron there mentioned was a Spaniard. There were two ordinances one in 1704, the other in 1718. They are referred to in 2. *Valin,* 252. *b.* 3. *tit.* 9. *art.* 7.

As to these ordinances, it is singular that they do not say that the goods of a friend in an enemy's ship shall be liable to confiscation; but that the
p. 400 goods of a Spanish subject in an enemy's ship | shall be so liable. This however implies the other proposition; for if the goods of their own subjects were so liable, the goods of a friend would, *a fortiori*, be liable.

It is said that these ordinances have not been enforced against *us*. But we are not bound to show that fact. It is sufficient for us that the law exists.

Reciprocity is the permanent basis of the law of nations.

3. If a neutral hire an armed vessel of our enemy, and with armed force resist our belligerent rights, he forfeits his neutral character.

A neutral may pursue his accustomed trade in his usual manner; but the law of nations allows nothing further.

It has been said that the only test of neutrality is impartiality to the belligerents. This is true only in a national point of view. But when individuals are concerned, a very different test applies. (*See the case of the Tulip.*) A neutral cannot justify furnishing one belligerent with transports, by furnishing them to the other also. (*See Vattel, b. 3. ch. 7.* §§ 109. 110, where will be found the whole doctrine of the law of nations on this subject.)

The general rule is that nothing shall be done by a neutral to invigorate the belligerent.

A right of peaceful commerce is not a right to set forth a warlike expedition. On that principle a government might be neutral and all its subjects belligerent. The words of the elementary writers are to be construed according to the subject upon which they treat. They all speak of a peaceable merchant vessel, not an armed vessel.

Neutrals, says sir W. Scott, may trade *in the same manner as before the war*, provided they take no direct part in the contest. It is not necessary to show that the party actually put a match to the guns.
p. 401 This vessel was forced into action by Pinto; at all events she | was brought into action by means of Pinto. He had a direct part in the contest.

The authority cited from Bynkershoek, is in our favor, if we interpret the words according to the subject matter. He says a neutral may let as well as hire a vessel, but it must be a lawful letting and hiring. He did not mean to say that a neutral may carry on a peaceful trade in a hostile manner. In the next sentence he says you may employ the *vessel* and the *labor* of the belligerent.

It is clear that he means an unarmed vessel.

What are the rights of the belligerent in regard to the neutral?

He may *search* the vessel, the cargo and the papers. We have reason to complain of a neutral who puts a cargo like this (a great part being belligerent) on board a belligerent armed vessel, whereby our right of

search is eluded, without a battle. A neutral may, indeed, if he can, elude the right of search by superior sailing, but he cannot lawfully prevent it by force.

In the case cited from 5 *Rob.* 206, there is not evidence that the vessel was armed. If the fact had been so it would undoubtedly have been mentioned by the reporter, or the judge. Their silence shows that it was not armed.

The slightest recourse to belligerent force in support of neutral rights is fatal. A neutral vessel may arm, but she cannot resist belligerent rights. A neutral must not directly nor indirectly contribute to the force of an enemy. In 1 *Rob.* 287, *the Maria*, it is decided that resistance of the convoy ship is the resistance of the whole convoy; and that the resistance of the ship affects the cargo. In the case of *the Elsebe*, 5 *Rob.* 174, (*Eng. Ed.*) one of the questions was whether the cargoes, belonging to subjects of the *Hans Towns*, laden on board Swedish vessels, and sailing under Swedish convoy, were liable to condemnation? the convoying ships having resisted search by the British fleet. It was contended on their behalf that they were not involved in the penalties of Swedish resistance, | which was an act of the Swedish government, and did not p. 402
bind the subjects of other powers; that the proprietors of these cargoes were not privy to this fact; and that the masters of the vessels were not the agents of the cargoes, so as to bind them. Sir William Scott, after stating that there was in the charter party an express stipulation that the ship should sail with convoy, says, 'But I will take the case on the 'supposition that there was no such engagement. The master associates 'himself with a convoy, the instructions of which he must be supposed 'to know; *he puts the goods under unlawful protection*, and it must be '*presumed* that this is done with due authority from the owners, and 'for their benefit. It is not the case of an unforeseen emergency happen-'ing to the ship at sea, where the fact itself proves the owners to be 'ignorant and innocent; and where the Court has held, that being 'proved innocent by the very circumstances of the case, they shall not 'be bound by the mere principle of law which imposes on the employer 'a responsibility for the acts of his agent. On the contrary it is a matter 'done *antecedently* to the voyage, and must therefore be presumed to be 'done on communication with the owners and with their consent; and 'the effect of this presumption is such that it cannot be permitted to be 'averred against; in as much as all the evidence must come from the 'suspected parties themselves, without affording a possibility of meeting 'it, however prepared. The Court has, therefore, thought it not unreason-'able to apply the strict principle of law, in a case not entitled to any 'favor, and holds, as it does in blockade cases of that description, that 'the master must be taken to be the authorized agent of the cargo, that

'he has acted under powers from his employer, and that if he has ex-
'ceeded his authority, it is barratry, for which he is personally answer-
'able, and for which the owner must look to him for indemnification.
'I pass over many considerations which have been properly pressed in
'argument; but I cannot omit to observe that this is not merely a
'question arising on a single fact of limited consequence; it is a pre-
'tention of infinite importance, and of great extent, being nothing less
'than an opposition to the general law of search, by which, if it could
'in one instance be admitted, the whole provisions of the law of nations
p. 403 'on that head might be effectually defined; | for if this principle could
'be maintained, by an interchange of convoys the whole unlawful
'business might be carried on with security. To put the goods of one
'country on board the ships of another, would be a complete recipe for
'the safety of the goods with a trifling alteration, easily understood,
'and easily practiced, while the mischief itself would exist in full force.'

The same principle was afterwards advanced by the Danish government, in relation to American ships sailing under British convoy, and acquiesced in by the American government. See the letter from our minister, Mr. Irvin, to the secretary of state of 23d June, 1811, and the letter from the Swedish minister, Rosencrantz, to Mr. Irvin, of the 28th of June, 1811. *State papers, p.* 224, 235.

A neutral cannot employ the force of his own government, nor that of another neutral, much less that of a belligerent, to protect himself from search. If you cannot make use of the convoy, you cannot take the guns of that convoy and protect yourself. It is not the modification of the force, but the force itself that is unlawful. If a neutral, insured as such, range himself under convoy, the policy is vacated.

This case is not like that of neutral goods put into a fortified town *before* investment: it is more like that of goods placed there after investment. They were put on board with a full knowledge that the vessel would be *invested,* (if a *land* term may be permitted in speaking of a naval transaction) that is, that she would be liable to search.

PINKNEY, *on the same side,*

Contended that this property ought to be condemned upon three grounds.

1. The treaty with Spain.

2. The principle of reciprocity; and,

3. The conduct of Pinto in hiring an armed vessel of the enemy, which made resistance. |

p. 404 1. As to the Spanish treaty. It contains the stipulation that 'free ships shall make free goods,' and it does not negative the converse proposition that enemy ships shall make enemy goods. Hence we are at liberty to give the stipulation its full extent and scope.

This principle was first attempted to be established by Holland immediately after the treaty of Munster. They sought to establish by treaty that the flag should communicate its character to the cargo. This was the original form of the proposition. It necessarily involved the principle that hostile ships should make hostile goods. How preposterous would it be to say that neutral ships should make neutral goods, but enemy's ships should not make enemy's goods.

It is the universal understanding among nations that the two propositions are mutually connected, and the one implies the other. It might have been necessary in the outset to express both, but when the principle was generally understood, that necessity ceased. The United States had no interest in extending the range of the principle; and in all her treaties, except those with Spain and Prussia, she has stipulated for both parts of the rule. There is no reason, either in the commercial or belligerent policy of the United States, which should induce her to stop short with the proposition that free ships should make free goods, and not go on to adopt the converse.

Spain had no motive to adopt the principle with the limitation under consideration. In her treaties with France, Holland and England, she adopts the principle in its whole extent. She took it with the qualification that neutrals should not put their goods on board a belligerent vessel. In her treaty with England she expresses only the converse, viz: that 'enemy ships shall make enemy goods.'

It has been said that she limited the principle by acceding to the armed neutrality; but that was a mere ephemeral act, and its validity depended upon an event which never happened—the accession of England.

2. As to the law of Spain and the principle of reciprocity. | In the ordinance of 1702 it appears to be her favorite principle that '*enemy ships shall make enemy goods.*' In the ordinance of 1718 the same principle is adopted and ordered to be carried into execution. These ordinances were re-enacted in 1739, 1756, 1779, 1794 and 1796. The treaty now under consideration was wedged in between two of these ordinances; those of 1794 and 1796. Is it possible that Spain, the declared enemy of neutral rights, meant to recognize a principle like this, which had never before been taken under the protection of any nation? Are we to suppose that Spain, by this treaty, meant to abandon her own local law? Spain has had this principle in abhorrence. By her ordnance of 1718 she says that if any part of the cargo is hostile it shall communicate its character to the ship and all the residue of the cargo. This principle cannot be understood but in the manner for which we contend. p. 405

By the law of Spain, therefore, this property would be liable to condemnation.

By the rule of reciprocity it ought to be condemned here.

But it is objected that the Spanish law has never been enforced against us. It is sufficient for us to show that it exists. In the absence of contrary proof the presumption is that it has been executed.

It is said also that the rule of reciprocity applies only to the case of re-capture and salvage. But sir W. Scott, in the *Santa Cruz*, (1 *Rob.* 53, *Am. Ed.*) says that 'this principle of reciprocity is by no means peculiar 'to cases of re-capture: it is found also to operate in other cases of 'maritime law: at the breaking out of a war it is the constant practice 'of this country to condemn property seized before the war, if the enemy 'condemns, and to restore if the enemy restores. It is a principle sanc-'tioned by the great foundation of the law of England, *magna charta* 'itself; which prescribes that at the commencement of a war the enemy's 'merchants shall be kept and treated as our own merchants are treated 'in their country.' |

p. 406 The principle of reciprocity has been distinctly recognized and adopted by the law of Spain. Holland remonstrated, but Spain answered that Holland had not resisted the maritime principles of England. The same answer was received from France when we complained of the Berlin and Milan decrees. The British orders in council also were founded upon the same principle. Great Britain attempted to justify them by the assertion that we acquiesced in the Berlin and Milan decrees. The assertion was not true; but it shows that Great Britain acknowledged the rule of reciprocity as a rule of the law of nations.

3. As to the armament and resistance.

The undisputed facts are that Pinto hired the whole vessel, and took in goods on freight for his own benefit. That the vessel was armed, sailed, resisted, and was captured.

It is contended that he could lawfully do all this. If he could, he was a 'chartered libertine.' Can a neutral surround himself 'with all the pomp and circumstance of war?' The idea of our opponents exhibits a *discordia rerum*—an incongruous mixture of discordant attributes; a centaur-like figure—half man, half ship; a phantastic form, bearing in one hand the spear of Achilles, in the other the olive branch of Minerva; the frown of defiance on her brow, and the smile of conciliation on her lip, entwining the olive branch of peace around the thunderbolt of Jupiter, and hurling it, thus disguised, indiscriminately at friends and foes.

From the authorities cited on the other side, an inference is attempted to be drawn that a neutral may lawfully employ an armed merchant vessel of the enemy to transport his goods. But none of those authorities speak of an *armed* vessel. Such a vessel unquestionably has power to make captures. If she has a commission, the captures are for her own

benefit; if she has no commission, she captures for the crown. Her prizes are *droits of admiralty*. It is true that if she sails without a pass, or some document to show her national character, she would be considered as a pirate; but this vessel had a British pass. If all neutrals may | lawfully hire such vessels, the ocean may be covered with them, p. 407
and they might more effectually aid the enemy than his own navy.

Bynkershoek says the neutral must do nothing to the prejudice of the belligerent. It is incumbent, therefore, upon Pinto to show that he did us no prejudice by chartering such an armed vessel. We say he thereby infringed our right of search. It is said that the right of search is a right to search the *ship* only. But why search the ship? To see what sort of a cargo she has. The cargo, therefore, must be searched as well as the ship. A neutral cannot carry contraband goods, nor violate blockade, nor carry his own property if it be the produce of his estate in the enemy's country. To prevent this the belligerent has a right to stop and search his cargo. In this case it is the hostile character of the vessel which constitutes the offence, in as much as it prevented our right of search.

In the case of the *Elsebe* the cargo was forfeited by sailing under convoy which resisted search. Pinto falls by the fate of war. He identified himself with a hostile armament; he knew the necessary consequence of his act; he knew it would be the duty of the ship to resist; and that resistance would be made if there should be any chance of escape thereby. He must be either at peace or war. He cannot claim the advantages of both conditions at the same time.

EMMETT, *in reply*,

After removing the objections which had been raised as to the British domicil of Pinto, and as to some variations between his testimony *in preparatorio* and his test affidavit, &c. observed,

As to the treaty with Spain, that the maxim 'free ships shall make free goods,' does not imply the converse, that hostile ships shall make hostile goods. There is certainly no necessary connexion between the two maxims, nor have they ever been supposed to be necessarily connected. The one is the claim of a neutral, the other of a belligerent. What is the rule of justice? That free ships should make free goods, and that free | goods, in belligerent ships, should be free also. When- p. 408
ever the two maxims have been connected in a treaty, it has been where one of the maxims was important to one of the parties as a neutral nation, and the other to the other party as a belligerent nation.

In the treaty of the armed neutrality in 1780, the interest of the Dutch was to have the benefit of both maxims. The Dutch idea however was discarded by the northern confederacy, and the two maxims completely separated. The empress of Russia in her manifesto of the 26th

of February, 1780, declaring the principles which she intended to follow, states this principle in the following words, ' That the effects belonging ' to the subjects of the said warring powers shall be free in all neutral ' vessels, except contraband merchandize.' But she says nothing respecting neutral goods found on board belligerent vessels. It cannot be supposed that she meant to surrender her neutral rights by mere implication. The principle is expressed in nearly the same words in the treaty of armed neutrality of 1780; nothing is there said respecting neutral goods in belligerent vessels. The king of Prussia, however, in his answer to the Russian manifesto, explicitly claims the freedom of neutral goods on board belligerent ships, as well as of belligerent goods on board of neutral ships. These facts show that in the general understanding of all Europe, the two maxims were entirely distinct and independent. *See also Martens's Law of Nations, translated by Cobbet*, 318. The United States did not exist as a nation until after the two maxims were thus completely separated.

Only three of the treaties by the United States have been produced on the other side. There are in fact eight in which the principle is mentioned. 1. The treaty with France of the 6th of February, 1778, *vol.* 1, *p.* 398, which expressly adopts both maxims; the United States having in that instance yielded to the belligerent claim of France. 2. The treaty with Holland of the 8th of October, 1782, *vol.* 1, *p.* 436. 3. The treaty with Sweden of 3d April, 1783, *vol.* 2, *p.* 256, adopts only the maxim that free ships shall make free goods. 4. The treaty with *Prussia* of 1785, *vol.* 2, *p.* 320, which adopts the principle free ships, &c. only.
p. 409 5. The treaty | with Morocco, 1787, *vol.* 2, *p.* 369, which stipulates that free ships shall make free goods, and that neutral goods on board of belligerent vessels shall also be free. This latter stipulation was necessary, in as much as the Barbary powers pay little respect in practice to the law of nations. 6. The treaty of 1795, with the Dey of Algiers, *vol.* 2, *p.* 500, which adopts the maxim, *free ships, free goods.* 7. The treaty with Spain of 1795, *vol.* 2, *p.* 526, adopts the same maxim. 8. The treaty with Tripoli, of 1796, *vol.* 4, *p.* 41, adopts the same maxim and further stipulates that neutral goods shall be free in belligerent vessels. It was not necessary that such a stipulation should be inserted in the treaty with Spain, because Spain knew the law of nations and professed to respect it.

If there be no doubt, then, as to the construction to be given by the Spanish treaty, there is no necessity to dismiss the ordinance which is supposed to be connected with it. The principle which they call the rule of reciprocity ought more properly to be called the rule of retaliation.

But there is no such ordinance of Spain as is pretended. The ordinance applies only to *Spanish* goods found on board the vessels of the

enemy, and was a mere temporary provision to continue only during the war. It appears by the extract from *D'Habreu*, found in 2 *Azuni*, 139, that the liability of the goods of neutrals found on board the vessels of the enemy depended upon *treaties* and not upon that ordinance.

The rule of retaliation is not a rule of the law of nations. The violation of the law of nations by one nation does not make it lawful for the offended nation to violate the law in the same way. It is true that states may resort to retaliation as a means of coercing justice from the other party. But this is always done as an act of state, and not as the mere result of a judicial execution of the law of nations. It is the effect of policy, not of law. Such were the measures adopted by the orders in council of Great Britain, and the offensive decrees of France, and of other nations under the control of France, which have been mentioned on the other side. The government of a state always undertakes to punish the violation | of its rights and it chooses its own means. But the p. 410
tribunals of justice must decide according to law.

The cases alluded to by sir W. Scott in the *Santa Cruz*, are cases in which the government could lawfully exercise its discretion in receding from its acknowledged rights. Thus in the case of property seized at the breaking out of a war, the government would have an unquestioned right to condemn or to release it. It was not the *right* to condemn which depended upon the rule of reciprocity, but the inexpediency. It was not a question of law, but of policy.

As to the armament, and the resistance.

It is difficult to say in what fact the opposite party consider the criminality to exist. Is it that Pinto took unarmed passengers on board? This was lawful. Was it the taking on board enemy goods? This was innocent. Was it in chartering an armed vessel? There is no rule of the law of nations against it. Was it in arming the vessel? The fact is not proved. Was it in joining in the combat? It is fully proved that he took no part in the contest.

But it is said that chartering the vessel makes him owner for the voyage. This is not the rule in a Court of admiralty. Even if an enemy charter a neutral vessel he is not owner for the voyage. The vessel is always restored. Bynkershoek says it is not unlawful for a neutral to hire a vessel from the enemy, for commercial purposes. But it is said that he means an unarmed vessel. There is nothing to support that idea. The natural presumption is that an enemy's ship would be armed.

It is said also that a neutral may deposit his goods in an armed belligerent vessel under a bill of lading, but not under a charter-party. That is, that several neutral merchants may severally occupy the whole ship, but that one cannot. A distinction founded upon no difference of principle cannot alter the case. How does he call the belligerent faculties

of the ship into action, more in one case than in the other? Does the neutral add to her belligerent faculty, by lading her deeply and giving her a destination from which she dare not depart in quest of her enemy? |

p. 411 This is not a *commissioned* vessel. That case *might* be different. The *Epervier* was a commissioned vessel, and it is said was coming from Bermuda with bullion for the British troops in Canada; otherwise probably a claim for the bullion would have been interposed. In the case of the British packets captured during the present war, was the property of the neutral passengers confiscated? These vessels were armed and commissioned. But there is no distinction taken in the books between commissioned and uncommissioned vessels, except that the latter cannot make captures, under the penalty of being treated as pirates. 2 *Azuni*, 233.

If the doctrine be true in regard to an armed vessel, it must be equally true with regard to convoy; yet they do not pretend that this vessel is liable to condemnation because she sailed with convoy. The law of England is now that no vessel shall sail without convoy. Such a doctrine would go to prevent neutral property from being laden on board an English merchantman. Did England suppose, when she was passing the law requiring all vessels to sail with convoy, that she was cutting herself off from all neutral freight?

When writers on the law of nations speak of a belligerent vessel, what do they mean? They speak of it as of a wolf which you can only hold by the ears—*Lupum auribus tenere.* They mean a vessel *carrying on war.* But can a vessel carry on war without arms? What degree of armament is sufficient to make it unlawful for a neutral to employ her? One musket, or two, or twenty?

The *Consolato del Mare*, was written long before the knowledge of fire arms, and does not speak of the distinction between armed and unarmed. In all the battles in which England has been engaged, and in all her commercial transactions, has such a case never occurred before? If it has, why are the books silent upon the subject. Why has not a single writer in the world mentioned the difference between neutral goods found in an armed and in an unarmed vessel of the enemy? *See* 2 *Azuni*, 194, 195, 196, 197, and the authorities there cited.

The owner of the ship was an enemy. He had a perfect right to arm
p. 412 and defend his ship. The master, for | this purpose was his exclusive agent. His act in defending the ship cannot be attributed to the innocent owner of the cargo, who also had a perfect right to put his goods on board such a ship; and who did not interfere in the combat. But it is said that a neutral has only a right to carry on his accustomed trade in his accustomed manner. Where is it said that it must be carried on

in his accustomed manner ? There is no authority for such a restriction, nor any principle to justify it.

But this trade from London to Buenos Ayres was always carried on in British ships, and often if not generally armed. This was a voyage carried on in the accustomed way.

It is said also that by putting these neutral goods on board an armed vessel our right of search, as a belligerent nation, was impaired.

But how is the right of search applicable to this case ? This is a secondary right, auxiliary to the belligerent right of capturing the enemy's goods on board a neutral vessel. It is applicable only to a vessel bearing a neutral flag. The belligerent has a right to know whether the cargo be really neutral, and for that purpose must examine it at sea. But if the vessel bears the flag of an enemy, there is no necessity to search the nature of the cargo at sea. You have the right to capture at once, and bring her in, when the cargo may be examined ; the neutral must make out his claim, and is never entitled to damages for the delay or the detention.

Why does neutral resistance of search forfeit the cargo as well as the vessel, although the owner of the cargo had no concern in the vessel nor in the resistance ? it is because the act of resistance was wholly unlawful ; and the owner of the cargo can recover damages from the owner of the vessel or the master. But here the resistance was lawful ; Pinto could never recover damages against the master for defending his ship.

March 11. *Absent*....TODD, *J.*

MARSHALL, *Ch. J.* after stating the facts of the case, delivered the opinion of the court as follows : |

' In support of the sentence of condemnation in this case, the captors p. 413
contend,

1. That the Claimant, Manuel Pinto, has neither made sufficient proof of his neutral character nor of his property in the goods he claims.

2. That by the treaty between Spain and the United States the property of a Spanish subject in an enemy's vessel is prize of war.

3. That on the principles of reciprocity this property should be condemned.

4. That the conduct of Manuel Pinto and of the vessel has impressed a hostile character on his property and on that of other Spaniards laden on board of the Nereide.

1. Manuel Pinto is admitted to be a native of Buenos Ayres, and to carry on trade at that place in connexion with his father and sister, who are his partners, and who also reside at Buenos Ayres ; but it is contended that he has acquired a domicil in England, and with that domicil the English commercial character.

Is the evidence in any degree doubtful on this point? Baltaza Ximenes, Antonio Lynch, and Felix Lynch, three Spaniards, returning with Pinto in the Nereide, all depose that Buenos Ayres is the place of his nativity and of his permanent residence, and that he carries on trade at that place.

In his test affidavit Manuel Pinto swears in the most explicit terms to the fact that Buenos Ayres is, and always has been the place of his permanent residence; that he carries on business there on account of himself, his father, and sister, and that he has been absent for temporary purposes only. His voyage to London, where he arrived in June, 1813, was for the purpose of purchasing a cargo for his trade at Buenos Ayres, and of establishing connexions in London for the purposes of his future trade at Buenos Ayres.

This plain and direct testimony is opposed, |

p. 414 1. By his examination *in preparatorio.*

In his answer to the first interrogatory he says that he was born at Buenos Ayres, that for seven years last past, he has lived and resided in England and Buenos Ayres, that he now lives at Buenos Ayres, that he has generally lived there for thirty-five years last past, and has been admitted a freeman of the new government.

Whatever facility may be given to the acquisition of a commercial domicil, it has never heretofore been contended that a merchant having a fixed residence, and carrying on business at the place of his birth, acquires a foreign commercial character by occasional visits to a foreign country. Had the introduction of the words '*seven years last past*' even not been fully accounted for by reference to the interrogatory, those words could not have implied such a residence as would give a domicil. But they are fully accounted for.

In his answer to the 12th interrogatory he repeats that he is a Spanish American; now lives and carries on trade at Buenos Ayres, and has generally resided there.

2. The second piece of testimony relied on by the counsel for the captors is the charter party. That instrument states Manuel Pinto to be of Buenos Ayres now residing in London.

The charter party does not state him to have been formerly of Buenos Ayres, but to be, at its date, of Buenos Ayres. Nothing can be more obvious than that the expression, *now residing in London*, could be intended to convey no other idea than that he was then personally in London.

As little importance is attached to the covenant to receive the return cargo at the wharf in London. The performance of this duty by the consignee of the cargo as the agent of Pinto, would be a complete execution of it.

Had the English character been friendly and the Spanish hostile, it would have been a hardy attempt indeed in | Mr. Pinto to found, on p. 415
these circumstances, a claim to a domicil in England.

The question respecting ownership of the goods is not so perfectly clear.

The evidence of actual ownership, so far as the claim asserts property existing, at the time, in himself and partners, is involved in no uncertainty. The test affidavit annexed to the claim is full, explicit, and direct. It goes as far as a test affidavit can go in establishing the right which the claim asserts. All the documentary evidence, relating to this subject, corroborates this affidavit. The charter party shows an expectation that, of a freight of 700*l.* the goods of Mr. Pinto would pay 400*l.* The very circumstance that he chartered the whole vessel furnishes strong inducement to the opinion that a great part of her cargo would be his own.

The witnesses examined *in preparatorio*, so far as they know any thing on the subject, all depose to his interest. William Puzey was clerk to Pinto, and he deposes to the interest of his employer, on the knowledge acquired in making out invoices and other papers belonging to the cargo. His belief too is, in some degree, founded on the character of Pinto in London, where he was spoken of as a man of great respectability and property; and from the anxiety he discovered for the safety of the property after the Nereide was separated from her convoy.

The bills of lading for that part of the cargo which is claimed by Pinto, are filled up, many of them with his name, some to order, and the marginal letters in the manifest would also denote the property to be his. Where he claims a part of a parcel of goods the invoice is sometimes to order, and the marginal letters would indicate the goods to be the property of Pinto and some other person.

This testimony proves, very satisfactorily, the interest of Pinto's house in the property he claims. There is no counter testimony in the cause, except the belief expressed by Mr. Puzey, that for a part of the goods Pinto was agent for the government of Buenos Ayres. This | belief p. 416
of Mr. Puzey is supposed to derive much weight from his character as the clerk of Mr. Pinto. The importance of that circumstance, however, is much diminished by the fact that he had seen Pinto only a week before the sailing of the Nereide, and that he does not declare his belief to be founded on any papers he had copied or seen; or on any communication made to him by his employer. There are other and obvious grounds for his suspicion. A part of the cargo consisted of arms and military accoutrements; and it was not very surprising that Puzey should conjecture that they were purchased for a government about to sustain itself by the sword. But this suspicion is opposed by considera-

tions of decisive influence, which have been stated at the bar. The demand for these articles in Buenos Ayres by the government would furnish sufficient motives to a merchant for making them a part of his cargo. In a considerable part of this warlike apparatus, British subjects were jointly concerned. It is extremely improbable, that, if acting for his government, he would have associated its interests with those of British merchants. Nor can a motive be assigned for claiming those goods for himself instead of claiming them for his government. They would not by such claim become his if restored. He would still remain accountable to his government, and the truth would have protected the property as effectually as a falsehood, should it remain undetected. By claiming these goods for himself, instead of his government, he would commit a perjury from which he could derive no possible advantage, and which would expose to imminent hazard, not only those goods but his whole interest in the cargo. The Court, therefore, must consider this belief of Mr. Puzey as a suspicion, which a full knowledge of the facts ought entirely to dissipate. If there was nothing in the cause but this suspicion, or this belief of Mr. Puzey, the court would not attach any importance to it. But Mr. Pinto himself has, in his examination *in preparatorio*, been at least indiscreet in asserting claims not to be sustained; and in terms which do not exhibit the real fact in its true shape. In his answer to the 12th interrogatory he says 'And this 'deponent also has one-fourth interest as owner of the following goods, '&c. viz. 15 bales of merchandize,' &c. In his claim he thus states the transaction under which his title to the one-fourth of these goods
p. 417 accrued. | He had agreed with certain persons in England to select for them a parcel of goods for the market of Buenos Ayres, of which he was to be the consignee, and which he would sell on a commission of 10 per cent. on the amount of sales at Buenos Ayres. These goods were selected, purchased, and consigned to Manuel Pinto. The bills of lading were in his possession, and he considered his interest under this contract as equal to one-fourth of the value of the goods, 'wherefore,' he says, 'he did suppose that he was interested in the said goods and merchandize for himself, his father, and sister, and well entitled, as the owner thereof, or otherwise, to an equal fourth part of the said goods, inasmuch as his commissions as aforesaid, would have been equal to such fourth.'

It is impossible to justify this representation of the fact. The reasoning might convince the witness, but the language he used was undoubtedly calculated to mislead the Court, and to extricate property to which the captors were clearly entitled, although the witness might think otherwise. Such misrepresentations must be frowned on in a prize Court, and must involve a claim, otherwise unexceptionable, in doubt and

danger. A witness ought never to swear to inferences without stating the train of reasoning by which his mind has been conducted to them. Prize Courts are necessarily watchful over subjects of this kind, and demand the utmost fairness in the conduct of Claimants. Yet prize Courts must distinguish between misrepresentations which may be ascribed to error of judgment, and which are, as soon as possible, corrected by the party who has made them, and wilful falsehoods which are detected by the testimony of others, or confessed by the party when detection becomes inevitable. In the first case there may be cause for a critical and perhaps suspicious examination of the claim and of the testimony by which it is supported; but it would be harsh indeed to condemn neutral property, in a case in which it was clearly proved to be neutral, for one false step, in some degree equivocal in its character, which was so soon corrected by the party making it.

The case of Mr. Paul's printing press is still less dubious in its appearance. It would require a very critical | investigation of the evidence to p. 418
decide whether this press is stated in his answer to the 12th interrogatory to be his property or not. Four presses are said in that answer to belong to him; but he also says in his answer to another interrogatory, perhaps the 26th, that Mr. Paul had one printing press on board. Whether there were five presses in the cargo, or only four, has not been decided, because the declaration made in his examination *in preparatorio* that one of the presses belonged to Mr. Paul proves unequivocally that the mistake, if he made one, was not fraudulent.

That he should state as his, the property which belonged to a house in Buenos Ayres, whose members all resided at the same place, and of which he was the acting and managing partner, was a circumstance which could not appear important to himself, and which was of no importance in the cause. These trivial and accidental inaccuracies are corrected in his claim and in his test affidavit. The Court does not think them of sufficient importance to work a confiscation of goods, of the real neutrality of which no serious doubt is entertained.

2. Does the treaty between Spain and the United States subject the goods of either party, being neutral, to condemnation as enemy property, if found by the other in the vessel of an enemy? That treaty stipulates that neutral bottoms shall make neutral goods, but contains no stipulation that enemy bottoms shall communicate the hostile character to the cargo. It is contended by the captors that the two principles are so completely identified that the stipulation of the one necessarily includes the other.

Let this proposition be examined.

The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of

an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States. This rule is founded on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to | p. 419 capture the goods of a friend. In the practical application of this principle, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found.

Many nations have believed it to be their interest to vary this simple and natural principle of public law. They have changed it by convention between themselves as far as they have believed it to be for their advantage to change it. But unless there be something in the nature of the rule which renders its parts unsusceptible of division, nations must be capable of dividing it by express compact, and if they stipulate either that the neutral flag shall cover enemy goods, or that the enemy flag shall infect friendly goods, there would, in reason, seem to be no necessity for implying a distinct stipulation not expressed by the parties. Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion. Neither the one nor the other is to be ascribed to inattention. And if an omitted article be not necessarily implied in one which is inserted, the subject to which that article would apply remains under the ancient rule. That the stipulation of immunity to enemy goods in the bottoms of one of the parties being neutral does not imply a surrender of the goods of that party being neutral, if found in the vessel of an enemy, is the proposition of the counsel for the Claimant, and he powerfully sustains that proposition by arguments arising from the nature of the two stipulations. The agreement that neutral bottoms shall make neutral goods is, he very justly remarks, a concession made by the belligerent to the neutral. It enlarges the sphere of neutral commerce, and gives to the neutral flag a capacity not given to it by the law of nations.

The stipulation which subjects neutral property, found in the bottom p. 420 of an enemy, to condemnation as prize of | war, is a concession made by the neutral to the belligerent. It narrows the sphere of neutral commerce, and takes from the neutral a privilege he possessed under the law of nations. The one may be, and often is, exchanged for the other. But it may be the interest and the will of both parties to stipulate the one

without the other; and if it be their interest, or their will, what shall prevent its accomplishment? A neutral may give some other compensation for the privilege of transporting enemy goods in safety, or both parties may find an interest in stipulating for this privilege, and neither may be disposed to make to, or require from, the other the surrender of any right as its consideration. What shall restrain independent nations from making such a compact? And how is their intention to be communicated to each other or to the world so properly as by the compact itself?

If reason can furnish no evidence of the indissolubility of the two maxims, the supporters of that proposition will certainly derive no aid from the history of their progress from the first attempts at their introduction to the present moment.

For a considerable length of time they were the companions of each other—not as one maxim consisting of a single indivisible principle, but as two stipulations, the one, in the view of the parties, forming a natural and obvious consideration for the other. The celebrated compact termed the armed neutrality, attempted to effect by force a great revolution in the law of nations. The attempt failed, but it made a deep and lasting impression on public sentiment. The character of this effort has been accurately stated by the counsel for the Claimants. Its object was to enlarge, and not in any thing to diminish the rights of neutrals. The great powers, parties to this agreement, contended for the principle, that free ships should make free goods; but not for the converse maxim; so far were they from supposing the one to follow as a corollary from the other, that the contrary opinion was openly and distinctly avowed. The king of Prussia declared his expectation that in future neutral bottoms would protect the goods of an enemy, and that neutral goods would be safe in an enemy bottom. There is no reason to believe that this opinion | was not common to those powers who acceded to the prin- p. 421
ciples of the armed neutrality.

From that epoch to the present, in the various treaties which have been formed, some contain no article on the subject and consequently leave the ancient rule in full force. Some stipulate that the character of the cargo shall depend upon the flag, some that the neutral flag shall protect the goods of an enemy, some that the goods of a neutral in the vessel of a friend shall be prize of war, and some that the goods of an enemy in a neutral bottom shall be safe, and that friendly goods in the bottom of an enemy shall also be safe.

This review which was taken with minute accuracy at the bar, certainly demonstrates that in public opinion no two principles are more distinct and independent of each other than the two which have been contended to be inseparable.

Do the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States have in some treaties stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods and that friendly goods shall be safe in the bottom of an enemy. It is therefore clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent of the other. They have stipulated expressly for their separation, and they have sometimes stipulated for the one without the other.

But in a correspondence between the secretary of state of the United States and the minister of the French republic in 1793, Prussia is enumerated among those nations with whom the United States had made a treaty adopting the entire principle that the character of the cargo should be determined by the character of the flag.

Not being in possession of this correspondence the Court is unable to examine the construction it has received. It has not deferred this opinion on that account, because the point in controversy at that time was the obligation imposed on the United States to protect belligerent
p. 422 property in their vessels, not the liability of their property to capture if found in the vessel of a belligerent. To this point the whole attention of the writer was directed, and it is not wonderful that in mentioning incidentally the treaty with Prussia which contains the principle that free bottoms make free goods, it should have escaped his recollection that it did not contain the converse of the maxim. On the talents and virtues which adorned the cabinet of that day, on the patient fortitude with which it resisted the intemperate violence with which it was assailed, on the firmness with which it maintained those principles which its sense of duty prescribed, on the wisdom of the rules it adopted, no panegyric has been pronounced at the bar in which the best judgment of this Court does not concur. But this respectful deference may well comport with the opinion, that an argument incidentally brought forward by way of illustration, is not such full authority as a decision directly on the point might have been.

3. The third point made by the captors is, that whatever construction might be put on our treaty with Spain, considered as an independent measure, the ordinances of that government would subject American property, under similar circumstances, to confiscation, and therefore the property, claimed by Spanish subjects in this case, ought to be condemned as prize of war.

The ordinances themselves have not been produced, nor has the Court received such information respecting them as would enable it to decide certainly either on their permanent existence, or on their applica-

tion to the United States. But be this as it may, the Court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure. It is for the consideration of the government not of its Courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its Courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track | prescribed for us, and to tread the devious and p. 423
intricate path of politics. Even in the case of salvage, a case peculiarly within the discretion of Courts, because no fixed rule is prescribed by the law of nations, congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.

Thus far the opinion of the Court has been formed without much difficulty. Although the principles asserted by the counsel, have been sustained on both sides with great strength of argument, they have been found on examination to be simple and clear in themselves. Stripped of the imposing garb in which they have been presented to the Court, they have no intrinsic intricacy which should perplex the understanding.

The remaining point is of a different character. Belligerent rights and neutral privileges are set in array against each other. Their respective pretensions, if not actually intermixed, come into close contact, and the line of partition is not so distinctly marked as to be clearly discernible. It is impossible to declare in favor of either, without hearing, from the other, objections which it is difficult to answer, and arguments which it is not easy to refute. The Court has given to this subject a patient investigation, and has endeavored to avail itself of all the aid which has been furnished by the bar. The result, if not completely satisfactory even to ourselves, is one from which it is believed we should not depart were further time allowed for deliberation.

4. Has the conduct of Manuel Pinto and of the Nereide been such as to impress the hostile character on that part of the cargo which was in fact neutral ?

In considering this question the Court has examined separately the parts which compose it.

p. 424 The vessel was armed, was the property of an enemy, | and made resistance. How do these facts affect the claim ?

Had the vessel been armed by Pinto, that fact would certainly have constituted an important feature in the case. But the Court can perceive no reason for believing she was armed by him. He chartered, it is true, the whole vessel, and that he might as rightfully do as contract for her partially ; but there is no reason to believe that he was instrumental in arming her. The owner stipulates that the Nereide ' well ' manned, victualled, equipped, provided and furnished with all things ' needful for such a vessel,' shall be ready to take on board a cargo to be provided for her. The Nereide, then, was to be put, by the owner, in the condition in which she was to sail. In equipping her, whether with or without arms, Mr. Pinto was not concerned. It appears to have been entirely and exclusively the act of the belligerent owner.

Whether the resistance, which was actually made, is in any degree imputable to Mr. Pinto, is a question of still more importance.

It has been argued that he had the whole ship, and that, therefore, the resistance was his resistance.

The whole evidence upon this point is to be found in the charter party, in the letter of instructions to the master, and in the answer of Pinto to one of the interrogatories *in preparatorio*.

The charter party evinces throughout that the ship remained under the entire direction of the owner, and that Pinto in no degree participated in the command of her. The owner appoints the master and stipulates for every act to be performed by the ship, from the date of the charter party to the termination of the voyage. In no one respect, except in lading the vessel, was Pinto to have any direction of her.

The letter of instructions to the master contains full directions for the regulation of his conduct, without any other reference to Mr. Pinto than has been already stated. That reference shows a positive limitation
p. 425 of | his power by the terms of the charter party. Consequently he had no share in the government of the ship.

But Pinto says in his answer to the 6th interrogatory that ' he had control of the said ship and cargo.'

Nothing can be more obvious than that Pinto could understand himself as saying no more than that he had the control of the ship and cargo so far as respected her lading. A part of the cargo did not belong to him, and was not consigned to him. His control over the ship began and ended with putting the cargo on board. He does not appear ever to have exercised any authority in the management of the ship. So far from exercising any during the battle, he went into the cabin where he remained till the conflict was over. It is, then, most apparent that when Pinto said he had the control of the ship and cargo, he used those terms

in a limited sense. He used them in reference to the power of lading her, given him by the charter party.

If, in this, the Court be correct, this cause is to be governed by the principles which would apply to it had the Nereide been a general ship.

The next point to be considered is the right of a neutral to place his goods on board an armed belligerent merchantman.

That a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean, is universally recognized as the original rule of the law of nations. It is, as has already been stated, founded on the plain and simple principle that the property of a friend remains his property wherever it may be found. 'Since it is not,' says Vattel, 'the place where a thing is which determines the nature of that thing, but the character of the person to whom it belongs, things belonging to neutral persons which happen to be in an enemy's country, or on board an enemy's ships, are to be distinguished from those which belong to the enemy.'

Bynkershoek lays down the same principles in terms equally explicit; and in terms entitled to the more consideration, because he enters into the enquiry whether a | knowledge of the hostile character of the vessel p. 426 can effect the owner of the goods.

The same principle is laid down by other writers on the same subject, and is believed to be contradicted by none. It is true there were some old ordinances of France declaring that a hostile vessel or cargo should expose both to condemnation. But these ordinances have never constituted a rule of public law.

It is deemed of much importance that the rule is universally laid down in terms which comprehend an armed as well as an unarmed vessel; and that armed vessels have never been excepted from it. Bynkershoek, in discussing a question suggesting an exception, with his mind directed to hostilities, does not hint that this privilege is confined to unarmed merchantmen.

In point of fact, it is believed that a belligerent merchant vessel rarely sails unarmed, so that this exception from the rule would be greater than the rule itself. At all events, the number of those who are armed and who sail under convoy, is too great not to have attracted the attention of writers on public law; and this exception to their broad general rule, if it existed, would certainly be found in some of their works. It would be strange if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed as to exclude from its operation almost every case for which it purports to provide, and yet that not a *dictum* should be found in the books pointing to such construction.

The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was

in a condition for self-defence, and the implements of war were so light and so cheap that scarcely any would sail without them.

A belligerent has a perfect right to arm in his own defence; and a neutral has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm—ought he to be accountable for the exercise of it? |

p. 427 By placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral. Why should it be changed by the exercise of a belligerent right, universally acknowledged and in common use when the rule was laid down, and over which the neutral had no control?

The belligerent answers, that by arming his rights are impaired. By placing his goods under the guns of an enemy, the neutral has taken part with the enemy and assumed the hostile character.

Previous to that examination which the Court has been able to make of the reasoning by which this proposition is sustained, one remark will be made which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is unlawful to deposit goods for transportation in the vessel of an enemy generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law.

It is said that by depositing goods on board an armed belligerent the right of search may be impaired, perhaps defeated.

What is this right of search? Is it a substantive and independent right wantonly, and in the pride of power, to vex and harrass neutral commerce, because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character.

Belligerents have a full and perfect right to capture enemy goods and articles going to their enemy which are contraband of war. To the exercise of that right the right of search is essential. It is a mean justified by the end. It has been truely denominated a right growing out of, and ancillary to the greater right of capture. Where this greater right may

p. 428 be legally exercised | without search, the right of search can never arise or come into question.

But it is said that the exercise of this right may be prevented by the inability of the party claiming it to capture the belligerent carrier of neutral property.

And what injury results from this circumstance? If the property be neutral, what mischief is done by its escaping a search. In so doing there

is no sin even as against the belligerent, if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if by means, lawful in themselves, he can escape this vexatious procedure, he may certainly employ them.

To the argument that by placing his goods in the vessel of an armed enemy, he connects himself with that enemy and assumes the hostile character; it is answered that no such connexion exists.

The object of the neutral is the transportation of his goods. His connexion with the vessel which transports them is the same, whether that vessel be armed or unarmed. The act of arming is not his—it is the act of a party who has a right so to do. He meddles not with the armament nor with the war. Whether his goods were on board or not, the vessel would be armed and would sail. His goods do not contribute to the armament further than the freight he pays, and freight he would pay were the vessel unarmed.

It is difficult to perceive in this argument any thing which does not also apply to an unarmed vessel. In both instances it is the right and the duty of the carrier to avoid capture and to prevent a search. There is no difference except in the degree of capacity to carry this duty into effect. The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel without imparting to his goods the belligerent character.

The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to the goods | or their owner, where he has taken no part in it. They p. 429
are incidents to the character of the vessel; and may always occur where the carrier is belligerent.

It is remarkable that no express authority on either side of this question can be found in the books. A few scanty materials, made up of inferences from cases depending on other principles, have been gleaned from the books and employed by both parties. They are certainly not decisive for or against either.

The celebrated case of the Swedish convoy has been pressed into the service. But that case decided no more than this, that a neutral may arm, but cannot by force resist a search. The reasoning of the judge on that occasion would seem to indicate that the resistance condemned the cargo, because it was unlawful. It has been inferred on the one side that the goods would be infected by the resistance of the ship, and on the other that a resistance which is lawful, and is not produced by the goods, will not change their character.

The case of the Catharine Elizabeth approaches more nearly to that of the Nereide, because in that case as in this there were neutral goods and a belligerent vessel. It was certainly a case, not of resistance, but

of an attempt by a part of the crew to seize the capturing vessel. Between such an attempt and an attempt to take the same vessel previous to capture, there does not seem to be a total dissimilitude. But it is the reasoning of the judge and not his decision, of which the Claimants would avail themselves. He distinguishes between the effect which the employment of force by a belligerent owner or by a neutral owner would have on neutral goods. The first is lawful, the last unlawful. The belligerent owner violates no duty. He is held by force and may escape if he can. From the marginal note it appears that the reporter understood this case to decide in principle that resistance by a belligerent vessel would not confiscate the cargo. It is only in a case without express authority that such materials can be relied on.

If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers
p. 430 forfeited by the same | cause ? The master and crew are prisoners of war, why are not those passengers who did not engage in the conflict also prisoners ? That they are not would seem to the Court to afford a strong argument in favor of the goods. The law would operate in the same manner on both.

It cannot escape observation, that in argument the neutral freighter has been continually represented as arming the Nereide and impelling her to hostility. He is represented as drawing forth and guiding her warlike energies. The Court does not so understand the case. The Nereide was armed, governed, and conducted by belligerents. With her force, or her conduct the neutral shippers had no concern. They deposited their goods on board the vessel, and stipulated for their direct transportation to Buenos Ayres. It is true that on her passage she had a right to defend herself, did defend herself, and might have captured an assailing vessel ; but to search for the enemy would have been a violation of the charter party and of her duty.

With a pencil dipped in the most vivid colours, and guided by the hand of a master, a splendid portrait has been drawn exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials, of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench, to discover its only imperfection ; its want of resemblance.

The Nereide has not that centaur-like appearance which has been ascribed to her. She does not rove over the ocean hurling the thunders of war while sheltered by the olive branch of peace. She is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile character of her owner. She is an open and declared belligerent ; claiming

all the rights, and subject to all the dangers of the belligerent character. She conveys neutral property which does not engage in her warlike equipments, or in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazard incident | to its situation; the hazard of being taken into port, p. 431
and obliged to seek another conveyance should its carrier be captured.

In this it is the opinion of the majority of the Court there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case. The sentence, therefore, of the Circuit Court must be reversed, and the property claimed by Manuel Pinto for himself and his partners, and for those other Spaniards for whom he has claimed, be restored, and the libel as to that property, be dismissed.

JOHNSON, *J.* Circumstances, known to this Court, have imposed upon me, in a great measure, the responsibility of this decision. I approach the case with all the hesitation which respect for the opinion of others and a conviction of the novelty and importance of some of the questions are calculated to inspire. The same respect imposes upon me an obligation briefly to state the course of reasoning by which I am led to my conclusion.

On the minor points I feel no difficulty. There is nothing to support the charge of English domiciliation; the charges of prevarication are satisfactorily explained; and on the question of national character, we must yet awhile reluctantly yield to the acknowledgement that Buenos Ayres is not free.

On the construction of the Spanish treaty, I feel as little hesitation. That a stipulation calculated solely to produce an extension of neutral rights, should involve in itself a restriction of neutral rights; that a mutual and gratuitous concession of a belligerent right, should draw after it a necessary relinquishment of a neutral right, which has never yielded but to express and (generally) extorted stipulation; are conclusions wholly irreconcilable to any principle of logical deduction.

Nor does the argument founded on reciprocity stand on any better ground. There is a principle of reciprocity known to Courts administering inter-national law; but I trust it is a reciprocity of benevolence, and that the angry passions which produce revenge and retaliation will never exert their influence on the administration of | justice. Dismal would be p. 432
the state of the world, and melancholy the office of a judge, if all the evils which the perfidy and injustice of power inflict on individual man, were to be reflected from the tribunals which profess peace and good will to all mankind. Nor is it easy to see how this principle of reciprocity, on the broad scale by which it has been protracted in this case, can be reconciled to the distribution of power made in our constitution among the three great departments of government. To the legislative power alone it must

belong to determine when the violence of other nations is to be met by violence. To the judiciary, to administer law and justice *as it is*, not as it is made to be by the folly or caprice of other nations.

The last question in the case is the only one on which I feel the slightest difficulty.

The general rule, the incontestible principle is, that a neutral has a right to employ a belligerent carrier. He exposes himself thereby to capture and detention, but not to condemnation.

To support the condemnation in this case, it is necessary to establish an exception to this rule ; and it is important to lay down the exceptions, contended for, with truth and precision.

In the first place, it is contended that a neutral has not a right to transport his goods on board of an armed belligerent.

Secondly, that if this right be conceded, Pinto, in this case, has carried the exercise of it beyond the duties of fair neutrality ;

1. By laying the vessel under the obligation of a contract to sail with convoy :

2. By chartering an entire armed vessel of the enemy, and thus expediting an armed hostile force :

3. By taking in enemy goods on freight, and thereby laying himself under an implied contract that the armament of the vessel should be used in its defence : |

p. 433 4. It was also contended that he had, in fact, armed the vessel after chartering her, and increased her force by admitting passengers :

5. That the correspondence, found on board, shews that the armament was immediately directed against capture by Americans.

On the first and principal ground much may be said, but nothing added to the ingenious discussion which it has received from counsel.

The question is, why may not a neutral transport his goods on board an armed belligerent ? No writer on the law of nations has suggested this restriction on his rights ; and it can only be sustained on the ground of its obstructing the exercise of some belligerent right. What belligerent right does it interfere with ? Not the right of search, for that has relation to the converse case ; it is a right resulting from the right of capturing enemy's goods in a neutral bottom. It must be then the right, which every nation asserts, of being the sole arbiter of its own conduct towards other nations, and deciding for itself, whether property, claimed as neutral, be owned as claimed. The question is thus fairly stated between the neutral and belligerent. On the one hand, the neutral claims the right of transporting his goods in the hostile bottom : On the other, the belligerent objects to his doing it under such circumstances as to impair his right of judging, between himself and the neutral, on the neutrality of his property and conduct. The evidence of authority,

the practice of the world, and the reason and nature of things must decide between them.

All these are, in my opinion, in favor of the neutral claim.

Every writer on international law acknowledges the right of the neutral to transport his goods in a hostile bottom. No writer has restricted the exercise of that right to unarmed ships.

Every civilized nation (with the exception of Spain) has unequivocally acknowledged the existence of this right, unless it be relinquished by express stipulation : | and, even with regard to Spain, the evidence p. 434
is wholly unsatisfactory to prove that she maintains a different doctrine. My present belief is, that she does not ; but, admit that she does ; and surely the practice of one nation, and that one not the most enlightened or commercial, ought not to be permitted to control the law of the world.

And what is the decision of reason on the merits of these conflicting pretensions ?

Her first and favorite answer would be, that were the scales equally suspended between the parties, the decision ought to be given in favor of humanity.

Already is the aspect of the world sufficiently darkened by the horrors of war. It is time to listen to the desponding claims of man engaged in the peaceful pursuits of life.

But there are considerations in favor of the neutral to which the heart need not assent ; they are addressed to the judgment alone.

Admit the claim of the belligerent, and you fritter away the right of the neutral until it is attenuated to a vision.

Admit the claim of the neutral and it is attended with a very immaterial change in the rights and interests of the belligerent.

Where are we to draw the line ? If a vessel is not to be armed, what is to amount to an exceptionable armament ? It extends to an absolute and total privation of the right of arming a hostile ship. Resistance, and even capture, is lawful to any belligerent that is attacked.

On the other hand, what injury is done to the belligerent by recognizing the right of the neutral ? The cargo of a belligerent neither adds to nor diminishes his right to resist. If empty he must be subdued before he can be possessed ; and, if laden, the right or faculty, of resistance is in no wise increased. It is inherent in her national character, and can be exercised by strict right, without any reference to the cargo that she contains. | Suppose the case of a vessel and cargo wholly neutral ; even p. 435
she possesses a natural right to resist seizure ; but her resistance must be effectual, or international law pronounces her forfeited. What injury results to the belligerent cruizer ? If the cargo be really neutral, the exercise of his right of judging becomes immaterial ; and if it be contraband, or otherwise subject to condemnation, what reason in nature can

be assigned why the neutral owner should not throw himself upon the fortune of war, and rely upon the protection of your enemy? You treat him as an enemy, if captured, and why should not he regard you as an enemy, and provide for his defence against you? I can very well conceive that a case may occur in which it may become the policy of this country to throw down the gauntlet to the world and assert a different principle. But the policy of these States is submitted to the wisdom of the legislature, and I shall feel myself bound by other reasons until the constitutional power shall decide what modifications it will prescribe to the exercise of any acknowledged neutral right.

The second ground of exception resolves itself into several points, and presents to my mind the greatest difficulties in the case.

1. There is a stipulation contained in the charter-party that the vessel shall sail with convoy.

2. Pinto chartered the whole vessel.

3. He took in sub-affreightment of hostile goods.

4. It is contended he had contributed to the arming and manning of the vessel after chartering her.

5. And that her equipment was pointedly against American capture.

With regard to the two latter points I am of opinion that the evidence does not prove that Pinto contributed to the armament of the vessel; and if she was armed by the owners, that it was against American capture is immaterial. As to the passengers, Pinto had no control over the
p. 436 reception of them into the vessel. He had | taken the hold and two berths in the cabin; as to the residue it remained subject to the disposal of the captain or owner.

With regard to the three other points, after the best consideration that I have been able to give the subject, I satisfy my mind by two considerations.

1. I will not now give an opinion upon the abstract case of an individual *neutral* to all the world. It is known that Pinto was liable to capture both by the French and Carthagenians. This justified him in placing himself under British protection; and if, in the exercise of this unquestionable right, he has incidentally impaired the exercise of our right of seizure for adjudication, we have nothing to complain of. The case occurs daily; and nothing but candor and fairness can be exacted of a neutral under such circumstances.

2. There appears to prevail much misconception with regard to the control acquired by Pinto, in this vessel, under the charter party. His contract gave him the occupation of the hold of the vessel and two berths in the cabin; but went no farther. Over the conduct of the master and crew, in navigating or defending the vessel, it communicated to him no power. It is true that by the conduct of the master and the

fate of the vessel, he might be incidentally affected as a sub-freighter, and so far he had an interest in her defence ; still, however, it is reducible to the general interest which he had in the performance of the voyage, and it does not appear that he ever acted under an idea of being authorized to control the conduct of the captain, or took any part in the conflict which preceded the capture.

I am of opinion that the judgment should be reversed and the property restored.

STORY, *J.* My opinion will be confined to the point last argued because it definitively disposes of the cause against the claim of Mr. Pinto.

The facts material to this point are that Mr. Pinto chartered the Nereide, an uncommissioned armed ship belonging to British subjects, for a voyage from London | to Buenos Ayres, and back to London at a p. 437
stipulated freight. The ship was to be navigated during the voyage at the expense of the general owner, who expressly covenanted, in the charter-party with Mr. Pinto, that she should sail on the voyage under British convoy. Mr. Pinto, having thus hired the whole ship, took on board sundry shipments, partly on his own or Spanish account, and partly on account of British merchants from whom he was to receive, in lieu of freight, a portion of the profits and commissions. The Nereide sailed with her cargo *under British convoy*, and with instructions from the owner to the master to govern himself, in relation to the objects of the charter-party, according to the direction of Mr. Pinto who accompanied the ship in the voyage. During the passage to Buenos Ayres, the Nereide was accidentally separated from the convoy, and, while endeavoring to regain it, was, after a vigorous but unsuccessful resistance, captured by the privateer Governor Tompkins, and brought into New York for adjudication.

It is explicitly asserted, in the testimony, that Mr. Pinto took no part in the resistance at the time of the capture.

The question is, whether, upon these facts, Mr. Pinto, assuming him to be a neutral, has so incorporated himself with the enemy interests as to forfeit that protection which the neutral character would otherwise afford him.

The general doctrine, though formerly subject to many learned doubts, is now incontrovertibly established, that neutral goods may be lawfully put on board of an enemy ship without being prize of war. As this doctrine is asserted in the most broad and unqualified manner in publicists, it is thence attempted to be inferred, by the counsel for the Claimant, that no distinction can exist whether the ship be armed or unarmed, or be captured with or without resistance—arguments of this sort are liable to many objections, and are in general wholly unsatisfactory. Elementary writers rarely explain the principles of public

law with the minute distinctions which legal precision requires. Many of the most important doctrines of the prize Courts will not be found to be treated of, or even glanced at, in the elaborate treatises of Grotius, or Puffendorf, or Vattel. A striking illustration is their total silence
p. 438 as to the illegality and penal | consequences of a trade with the public enemy. Even Bynkershoek, who writes professedly on prize law, is deficient in many important doctrines which every day regulate the decrees of prize tribunals. And the complexity of modern commerce has added incalculably to the number as well as the intricacy of questions of national law. In what publicist are to be found the doctrines as to the illegality of carrying enemy dispatches, and of engaging in the coasting, fishing, or other privileged trade of the enemy? Where are transfers *in transitu* pronounced to be illegal? Where are accurately and systematically stated all the circumstances which impress upon the neutral a general, or a limited, hostile character, either by reason of his domicil, his territorial possessions, or his connexion in a house of trade, in the enemy country? The search would be nearly in vain in the celebrated Jurists whose authority has been quoted to silence the present enquiry. Yet the argument would be no less forcible that these doctrines have not a legal existence because not found in systematic treatises on the law of nations, than that which has been so earnestly pressed upon us by the counsel for the Claimants. The assumed inference is then utterly inadmissible. The question before the Court must be settled upon other grounds; upon a just application of the principles which regulate neutral, as well as belligerent, rights and duties. Let us then proceed to consider them:—

It is a clear maxim of national law that a neutral is bound to a perfect impartiality as to all the belligerents. If he incorporate himself into the measures or policy of either; if he become auxiliary to the enterprizes or acts of either, he forfeits his neutral character—nor is this all. In relation to his commerce he is bound to submit to the belligerent right of search, and he cannot lawfully adopt any measures whose direct object is to withdraw that commerce from the most liberal and accurate search without the application on the part of the belligerent of superior force. If he resist this exercise of lawful right, or if, with a view to resist it, he take the protection of an armed neutral convoy, he is treated as an enemy, and his property is confiscated. Nor is it at all material whether the resistance be direct or constructive. The resistance of the convoy is the resistance of all the ships associated under the
p. 439 common protection, without any | distinction whether the convoy belong to the same or to a foreign, neutral sovereign—for upon the principles of natural justice, a neutral is justly chargeable with the acts of the party, which he voluntarily adopts, or, of which he seeks the shelter

and protection. *Qui sentit commodum sentire debet et onus*—these principles are recognized in the memorable cases of the *Maria*, 1, *Rob.* 340, *and the Elsebe*, 5, *Rob.* 173; and can never be shaken without delivering over to endless controversy and conflict the maritime rights of the world.

It has however been supposed, by the counsel of the Claimants, that a distinction exists between taking the protection of a neutral, and of a belligerent, convoy. That in the former case all armament for resistance is unlawful; but in the latter case it is not only lawful but in the highest degree commendable. That although an *unlawful act*, as resistance by a neutral convoy, may justly affect the whole associated ships; yet it is otherwise of a *lawful act*, as resistance of a belligerent ship, for no forfeiture can reasonably grow out of such an act which is strictly justifiable.

The fallacy of the argument consists in assuming the very ground in controversy; and in confounding things, in their own nature entirely distinct. An act perfectly lawful in a belligerent, may be flagrantly wrongful in a neutral. A belligerent may lawfully resist search; a neutral is bound to submit to it. A belligerent may carry on his commerce by force; a neutral cannot. A belligerent may capture the property of his enemy on the ocean; a neutral has no authority whatever to make captures. The same act, therefore, that, with reference to the rights and duties of the one, may be tortious, may, with reference to the rights and duties of the other, be perfectly justifiable. The act then, as to its character, is to be judged of, not merely by that of the parties, through whose immediate instrumentality it is done; but also by the character of those, who, having co-operated in, assented to, or sought protection from, it, would yet withdraw themselves from the penalties of the act. It is analogous to the case at common law where an act, justifiable in one party, does not, from that fact alone, shelter his coadjutor. They must stand or fall upon | their own merits. It would p. 440
be strange indeed, if, because a belligerent may kill his enemy, a neutral may aid in the act; or because a belligerent may resist search, a neutral may co-operate to make it effectual. It is therefore an assumption, utterly inadmissible, that a neutral can avail himself of the lawful act of an enemy to protect himself in an evasion of a clear belligerent right.

And what reason can there be for the distinction contended for? Why is the resistance of the convoy deemed the resistance of the whole neutral associated ships, let them belong to whom they may? It is not that there is a direct and immediate co-operation in the resistance, because the case supposes the contrary. It is not that the resistance of the convoy of the sovereign is deemed an act to which all his own

subjects consent, because the ships of foreign subjects would then be exempted. It is because there is a constructive resistance resulting in law from the common association and voluntary protection against search under a full knowledge of the intentions of the convoy? Then the principle applies as well to a belligerent as to a neutral convoy? For it is manifest that the belligerent will at all events resist search; and it is quite as manifest that the neutral seeks belligerent protection with an intent to evade it. Is it that an evasion of search, by the employment, protection, or, terror of force, is inconsistent with neutral duties? Then *a fortiori* the principle applies to a case of belligerent convoy, for the resistance must be presumed to be more obstinate and the search more perilous.

There can be but little doubt that it is upon the latter principles that the penalty of confiscation is applied to neutrals. The law proceeds yet farther and deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and therefore attributes to such preliminary act, the full effect of actual resistance. In this respect it applies a rule analogous to that in cases of blockade, where the act of sailing with an intent to break a blockade is deemed a sufficient breach to authorize confiscation. And sir W. Scott manifestly recognizes the correctness
p. 441 of this doctrine in the Maria, | although the circumstances of that case did not require its rigorous application.

Indeed, in relation to a neutral convoy, the evidence of an intent to resist, as well as of constructive resistance, is far more equivocal than in case of a belligerent convoy. In the latter case it is necessarily known to the convoyed ships that the belligerent is bound to resist and will resist until overcome by superior force. It is impossible therefore to join such convoy without an intention to receive the protection of belligerent force in such manner and under such circumstances as the belligerent may choose to apply it. It is an adoption of his acts, and an assistance of his interests during the assumed voyage. To render the convoy an effectual protection, it is necessary to interchange signals and instructions, to communicate information, and to watch the approach of every enemy. The neutral solicitously aids and co-operates in all these important transactions, and thus far manifestly sides with the belligerent and performs, as to him, a meritorious service—a service as little reconcileable with neutral duties, as the agency of a spy, or the fraud of a bearer of hostile dispatches. In respect to a neutral convoy the inference of constructive co-operation and hostility is far less certain and direct. To condemn, in such case, is pushing the doctrine to a great extent, since it is acting upon the presumption, which is not permitted to be contradicted, that all the convoyed ships distinctly understood and adopted

the objects of the convoy, and intimately blended their own interests with hostile resistance.

There is not, then, the slightest reason for the favorable distinction, as to the belligerent convoy, assumed by counsel. On the contrary, every presumption of hostility is, in such case, more violent, and every suspicion of unneutral conduct more inflamed. And so in the argument of the *Maria*, 1 *Rob.* 346, it was conceded by the counsel for the Claimants, and recognized by the Court. It was there said by counsel that it seemed admitted by the Court on a former day that there was a just distinction to be made between the two cases of convoy, viz: between the convoy of an enemy's force, and a neutral convoy; that the former (i. e. enemy convoy) would stamp a *primary character of hostility* on all ships | sailing p. 442 under its protection, and it would rest on the parties to take themselves out of the presumption raised against them; but that, even in that case, it would be nothing more than a presumption, which had been determined by a late case before the Lords, *the Sampson, Barney*, an asserted American ship sailing with French cruizers at the time they engaged some English ships, and communicating with the French ships by signal for battle. That, in that case, although there had been a condemnation in the Court below, the Lords sent it to farther proof to ascertain whether there had been an actual resistance. Sir Wm. Scott emphatically observed, 'I do 'not admit the authority of that case to the extent to which you push it. 'That question is still reserved, although the Lords might wish to know 'as much of the facts as possible.' It is clear, from this language, that the learned judge did not admit that the party could be legally permitted to contradict the presumption of hostility attached to the sailing under an enemy convoy. On the contrary, he seemed to consider that the *primary* character of hostility, which, it was conceded on all sides, was stamped upon such conduct, could not be permitted to be rebutted, but was conclusive upon the party. The case of the Sampson was originally heard before the Court of vice admiralty, and the decree of condemnation was never disapproved of, if not ultimately affirmed, by the Lords of Appeal. I have been assured by very respectable authority that no proof of actual resistance ever was, or could have been, made on the final hearing. The case, therefore, affords a strong inference of the law as understood and administered in the prize Courts of Great Britain.

And it may be added, in corroboration, that in *Smart v. Wolff*, 3 *T. R.* 323, 332, sir W. Scott (then advocate general) asserted, without hesitation, that if the neutral refused search, or sailed under convoy of the enemy's ships of war, or conveyed intelligence to the enemy, they are wavers of the rights of neutrality. The very circumstance of his putting these three cases in connexion to illustrate his general argument, affords the most

cogent proof that he considered himself as stating a doctrine equally clear and well established as to all of them.[1] |

p. 443 And this doctrine seems conformable to the sense of other European sovereigns. In the recent cases of the American ships captured while under British convoy by the Danes, the right of condemnation was not only asserted and enforced by the highest tribunal of prize, but expressly affirmed by the Danish sovereign after an earnest appeal made by the government of the United States. On that occasion the Danish minister pressed the argument 'that he who causes himself to be protected by 'that act, (i. e. enemy convoy) ranges himself on the side of the protector, 'and thus puts himself in opposition to the enemy of the protector, and 'evidently renounces the advantages attached to the character of a friend 'to him against whom he seeks the protection. If Denmark should 'abandon this principle, the navigators of all nations would find their 'account in carrying on the commerce of Great Britain, under the 'protection of English ships of war without any risk;' and he further declared 'that none of the powers in Europe have called in question the 'justice of this principle.' State papers, 1811, p. 527.

It cannot be denied that our own government have acquiesced in the truth and correctness of this statement. And if to the general silence of the other European sovereigns we add the positive examples of Great Britain and Denmark, (the latter of whom has not of late years been deficient in zeal for neutral rights) it seems difficult to avoid the conclusion that the doctrine is as well founded in national law, as it seems to me to be in justice and sound policy.

Another argument which has been urged in favor of the assumed distinction ought not, however, to be omitted. It is that a party, neutral

p. 444 as to one power, may be an enemy as to another power, and he may lawfully place himself under belligerent convoy to escape from his own enemy. In such a predicament it is, therefore, always open to the neutral to explain his conduct in taking convoy, and to show, by proofs, his innocent intentions as to all friendly belligerents. In my judgment this supposed state of things would not remove a single difficulty.

It is not in relation to enemies that the question as to taking convoy

[1] Since this opinion was delivered I find, by an account of all the appeals and final decisions thereon before the lords of appeal, published by order of the house of commons in 1801, that the judgment of condemnation in the Sampson was affirmed by the lords of appeal. The following is a transcript of the printed account: 'Sampson, Joshua Barney, master; cargo, sugar, coffee, cotton, indigo and dry 'goods, and specie, taken by his majesty's ship of war Penelope, Bartholomew 'Samuel Rowley, esq. commander, claimed for American subjects for ship, cargo 'and specie—sentence appealed from—pronounced at Jamaica 22d April, 1794— 'ship, cargo and specie condemned. Sentence in the Court of Appeals, viz: 31st 'of May, 1798, sentence affirmed; as to the specie claimed on behalf of Wacksmuth 'and Dutilh; and 21st of June, further proof directed to be made of the property 'of the ship, cargo, and rest of the specie. 29th June, 1799, ship, cargo and specie 'condemned.'

can ever arise. It has reference only to the rights of friendly belligerents; and these rights remain precisely the same whatever may be the peculiar situation of the neutral as to third parties. Was it ever heard of that a neutral might lawfully resist the right of search of one power, because he was at war with another? And is not the evasion of this right just as injurious whether the neutral be at peace with all the world, or with a part only?

There would be extreme difficulty in establishing, by any disinterested testimony, the fact of any such special intentions as the argument supposes. Independent of this difficulty, it would, in effect, be an attempt to repel, by positive testimony, a conclusive inference of law flowing from the very act of taking convoy. The belligerent convoy is bound to resist all visitations by enemy ships, whether neutral to the convoyed ships or not. This obligation is distinctly known to the party taking its protection. If, therefore, he choose to continue under the convoy, he shows an intention to avail himself of its protection under all the chances and hazards of war. The abandonment of such intention cannot be otherwise evidenced than by the overt act of quitting convoy. And it is impossible to conceive that the mere secret wishes or private declarations of a party could prevail over his own deliberate act of continuing under convoy, unless Courts of prize would surrender themselves to the most stale excuses and imbecile artifices. It would be in vain to administer justice in such Courts, if mere statements of intention would outweigh the legal effects of the acts of the parties. Besides, the injury to the friendly belligerent is equally great whatever might be the special objects of the neutral. The right of search is effectually prevented by the presence of superior | force, or exercised only after the perils and injuries of victorious warfare. p. 445
And it is this very evasion of the right of search that constitutes the ground of condemnation in ordinary cases. The neutral, in effect, declares that he will not submit to search until the enemy convoy is conquered, and then only because he cannot avoid it. The special intention of the neutral then could not, if proved, upon principle prevail, and it has not a shadow of authority to sustain it. The argument upon this point was urged in the Maria and Elsebe, and was instantly repelled by the Court.

On the whole, on this point my judgment is, that the act of sailing under belligerent or neutral convoy is of itself a violation of neutrality, and the ship and cargo if caught *in delicto* are justly confiscable; and further, that if resistance be necessary, as in my opinion it is not, to perfect the offence, still that the resistance of the convoy is to all purposes the resistance of the associated fleet. It might, with as much propriety, be maintained that neutral goods, guarded by a hostile army in their passage through a country, or voluntarily lodged in a hostile fortress, for the avowed purpose of evading the municipal rights and regulations of that country,

should not in case of capture be lawful plunder, (a pretension never yet asserted) as that neutral property on the ocean should enjoy the double protection of war and peace.

If these principles be correct, it remains to be considered how far the conduct of Mr. Pinto brings him within the range of their influence. It is clear that in the original concoction of the voyage it was his intention to avail himself of British convoy. The covenant in the charter party demonstrates this intention ; a covenant that, from its terms, being made *by* the ship owner, must have been inserted for the benefit and at the instance of the charterer. Under the faith of this stipulation Mr. Pinto put his own property on board and received shipments from persons of an acknowledged hostile character. The ship sailed on the voyage, under British convoy, with Mr. Pinto on board, and though captured after a separation from the convoy, she was in the very attempt to rejoin it. There is no pretence, therefore, of an abandonment of the convoy, and the | p. 446 *corpus delicti*, the character of hostility, impressed by the sailing under convoy, if any attached, remained notwithstanding the separation. It is like the sailing for a blockaded port, where the offence continues, although at the moment of capture the ship be, by stress of weather, driven in a direction from the port of destination ; for the hostile intention still remains unchanged.

And here to avoid the effect of the general doctrine, we are met with another distinction founded upon the supposed difference between a belligerent and a neutral merchant ship as to the taking of convoy. It is argued that the belligerent ship has an undoubted right to take the protection of the convoy of the nation to which she belongs ; and that this extends a perfect and lawful immunity to the neutral cargo on board.

It is certainly incumbent on the counsel for the Claimant to support this exception to the general rule by precedent or analogy. Nothing has been offered which, in my judgment, affords it the slightest support. It is not true that a neutral can shelter his property from confiscation behind an act lawful in a belligerent. The law imputes to the neutral the consequences of the act if he might have foreseen and guarded against it, or if he voluntarily adopts it. Was it ever supposed that a neutral cargo was protected from seizure by going in a belligerent ship to a blockaded port ? or that contraband goods, belonging to a neutral, were exempted from confiscation because on board of such a ship bound on a voyage lawful to the belligerent, but not to the neutral ? yet the pretensions in these cases seem scarcely more extravagant than that now urged. Why should a neutral be permitted to do that indirectly which he is prohibited from doing directly ? Why should he aid the enemy by giving extraordinary freight for belligerent ships sailing under belligerent convoy with the avowed purpose of escaping from search, and often with the con-

cealed intention of aiding belligerent commerce, and yet claim the benefits of the most impartial conduct ? Until some more solid ground can be laid for the distinction than the ingenuity of counsel has yet suggested, it would seem fit to declare *ita lex non scripta est.*

But even if the distinction existed, it could not apply | to the case at p. 447
bar. This is a case where the Claimant becomes the charterer of the whole vessel for the voyage and stipulates for the express benefit of convoy. The ship, though navigated by a belligerent master and crew, was necessarily under the control and management of the charterer. He was the real effective *dux negotii.* Whatever may be the technical doctrine of the common or prize law as to the general property in the ship, the charterer was, to all purposes important in this enquiry, the owner for the voyage, and the master his agent. Can there be a doubt that, as to the shipments of the enemy freighters, Mr. Pinto was responsible for the acts of the master ? Was he not materially interested in the safety and protection of these shipments in respect to freight, commissions and profits ? If they had been lost by capture, from the negligence of Mr. Pinto or of the master, when by ordinary diligence and resistance the loss might have been avoided, would not Mr. Pinto have been responsible ? How then it can be consistently held that the ship was not essentially governed and managed by Mr. Pinto, and all her conduct incorporated with his interests, I profess to be unable to comprehend. For what purpose should he insist on a covenant for convoy, if he never meant to derive aid and protection from it to the whole cargo on board, and to range himself and his interests on the side of resistance ? His private conduct at the time of the capture, when resistance was almost hopeless, affords no evidence to repel the irresistible presumptions from his deliberate acts.

And here again it has been argued that Mr. Pinto had no hostile intentions against the United States ; but that the taking of convoy was simply to resist the French and Carthagenians, who are the enemies of his own country. If such special intention could, in point of law, uphold his claim which, for the reasons already stated, I am entirely satisfied it could not, yet there is not, in the present case, within my recollection, any proof of such special intention. It rests upon the mere suggestions of counsel. How, indeed, could Mr. Pinto show that he meant to yield his property to the search of the cruizers of the United States, when the deliberate act of assuming British convoy precluded the possibility of its exercise, unless acquired by victory after resistance ? |

If this view of the case be correct, it must be pronounced that Mr. Pinto, p. 448
by voluntarily sailing under convoy, forfeited his neutrality, and bound his property to an indissolubly hostile character.

This, however, is not the only ground upon which the claim of Mr. Pinto ought to be repudiated. There was not merely the illegality

of sailing under enemy convoy up to the very eve of capture, but the fact of actual resistance of the chartered ship, and submission to search only in consequence of superior force.

An attempt, however, is made to extract the case at bar, from the penalty of confiscation attached to resistance of search, upon the ground that Mr. Pinto took no part in this resistance. It is asserted, that a shipper in a general ship is not affected by the act of the enemy master ; that the charterer of the whole ship is entitled to as favorable a consideration ; and that there is no difference, in point of law, whether the ship have, or have not a commission, or be, or be not armed. It will be necessary to give to these positions a full examination.

In the first place, it is to be considered whether a neutral shipper has a right to put his property on board of an armed belligerent ship without violating his neutral duties. If the doctrine already advanced on the subject of convoy be correct, it is incontestible that he has no such right. If he cannot take belligerent convoy, *a fortiori* he cannot put his property on board of such convoy ; or, what is equivalent, on board of an armed and commissioned ship of the belligerent. What would be the consequences if neutrals might lawfully carry on all their commerce in the frigates and ships of war of another belligerent sovereign ? That there would be a perfect identity of interests and of objects, of assistance and of immunity, between the parties. The most gross frauds and hostile enterprizes would be carried on under neutral disguises, and the right of search would become as utterly insignificant in practice as if it were extinguished by the common consent of nations. The extravagant premiums and freights which neutrals could well afford to pay for this extraordinary protection would enable the belligerent to keep up armaments of incalculable | size, to the dismay and ruin of inferior maritime p. 449 powers. Such false and hollow neutrality would be infinitely more injurious than the most active warfare. It would strip from the conqueror all the fruits of victory, and lay them at the feet of those whose singular merit would consist in evading his rights, if not in collusively aiding his enemy. It is not therefore to be admitted that a neutral may lawfully place his goods under armed protection, on board of an enemy ship. Nor can it be at all material whether such armed ship be commissioned or not : that is an affair exclusively between a sovereign and his own subjects, but is utterly unimportant to the neutral. For whether the armament be employed for offence, or for defence, in respect to third parties, the peril and the obstruction to the right of search are equally complete. Nor is it true, as has been asserted in argument, that a non-commissioned armed ship has no right to capture an enemy ship, except in her own defence. The act of capture without such pretext, so far from being piracy, would be strictly justifiable upon the law of nations, however

it might stand upon the municipal law of the country of the capturing ship. Vattel has been quoted to the contrary; but on a careful examination, it will be found that his text does not warrant the doctrine.

I have had occasion to consider this point in another cause, in this Court, and to the opinion then delivered I refer for a more full discussion of it. If the subject capture without a commission, he can acquire no property to himself in the prize; and if the act be contrary to the regulations of his own sovereign, he may be liable to municipal penalties for his conduct. But as to the enemy he violates no rights by the capture. Such, on an accurate consideration, will be found to be the doctrine of Puffendorf, and Grotius, and Bynkershoek, and they stand confirmed by a memorable decision of the lords of appeal, in 1759. 2 *Brown's civil and adm. app.* 524—*Grotius lib.* 3, *ch.* 6, *s.* 8, 9, 10—*and Barbeyrac's note on s.* 8, *Puffendorf, lib.* 8, *ch.* 6, *s.* 21, *&c. Bynk.* 2, *P. J. ch.* 3, 4, 16, 17. 2 *Woodes. lect.* 432. *Consol. del. Mare ch.* 287, 288. 4 *Inst.* 152, 154. *Zouch adm.* 101. *Casaregis Disc.* 24 *n.* 24. *Com. dig. admiralty, E.* 3. *Buls. c.* 27.

Admitting, however, (what to me seems utterly inadmissible) | that p. 450
a neutral may lawfully ship his goods on board the armed ship of an enemy, it will be of little avail, unless he is exempted from the consequences of all the acts of such enemy. If the shipment be innocent, it will be of little avail in this case, if the resistance of the enemy master will compromit the neutral character of the cargo. To the establishment, therefore, of such an exemption, the exertions of counsel have been strenuously directed. It has been inferred from the silence of elementary writers, from the authority of analogous cases, and from the positive declarations of the Court, in the *Catharina Elizabeth,* 5 *Rob.* 232.

The argument drawn from the silence of Jurists has been already sufficiently answered. It remains to consider that which is urged upon the footing of authority. The reasoning from supposed analogous cases is quite as unsatisfactory. It is not true, as to neutrals, that the act of the master never binds the owner of the cargo unless the master is proved to be the actual agent of the owner. The act of the master may be, and very often is, conclusive upon the cargo, although no general agency is established. Suppose he violate a blockade, suppress and fraudulently destroy the ship's papers, or mix up under the same cover enemy interests, will not the cargo share the fate of the ship? The cases cited are mere exceptions to the general rule. They, in general, turn upon a settled distinction, that the act of the master shall not bind the cargo, where the act under the circumstances could not have been within the scope or contemplation of the shipper at the time of shipment; or where his ignorance of the voyage, and of the intended acts of the master, is placed beyond the possibility of doubt. *See the Adonis,* 5 *Rob.* 256. The very

case of resistance is a strong illustration of the principle. The resistance of the neutral master, has been deliberately held to be conclusive on the neutral cargo. *The Elsebe*, 5 *Rob.* 173. *The Catharina Elizabeth*, 5 *Rob.* 232. What reason can there be for a different rule in respect to a belligerent master ?

It must be admitted that the language of the Court in the case of the Catharina Elizabeth would at first view, seem to support the position of the Claimant's counsel. On a close examination, however, it will not be
p. 451 found to | assert so broad a doctrine. The case was of a rescue attempted by an enemy master having on board a neutral cargo ; and this rescue attempted, not of the *captured*, but of the *capturing*, ship. It was argued that this resistance of the master exposed the whole cargo, entrusted to his management, to confiscation. The Court held that no such penalty was incurred. That the resistance could only be the hostile act of a hostile person *who was a prisoner of war*, and who, unless under parole, had a perfect right to emancipate himself by seizing his own vessel. That the case of a neutral master differed from that of an enemy master. No duty was violated by such an act on the part of the latter ; *lupum auribus teneo*, and if he could withdraw himself he had a right so to do. And that a *material* fact in the case was, that the master did not attempt to withdraw his property, but to rescue *the ship of the captor* and not his own vessel. Such was the decision of the Court, upon which several observations arise. In the first place the resistance was not made previous to the capture ; and therefore whatever may be the extent of the language, it must be restrained to the circumstances of the case in judgment, otherwise it would be extra-judicial. In the next place it would be impossible to conceive how the fact, as to what vessel was seized, could be *material*, if the argument of the present Claimant be correct, for in all events the resistance as to the cargo would be without any legal effects. In the last place it is clear, that the case is put by the Court upon the ground, that the master at the time of the act had been dispossessed of his vessel by capture, and was a prisoner of war. He was, therefore, no longer acting as master of the ship, and had no further management of her. His rights and duties, as master, had entirely ceased by the capture, and there could be no pretence to affect the ship or cargo with his subsequent acts, any more than with the acts of any other stranger. The case would have been entirely different with a neutral master, *whose relation to his ship continues notwithstanding a capture* and carrying in for adjudication. The case therefore admits of sound distinctions from that at bar, and cannot be admitted to govern it.

There is another text, not cited in the argument, which may be thought to favor the doctrine of the Claimant's counsel. It is the only
p. 452 passage bearing on the subject in | controversy which has fallen under my

notice in any elementary work. Casaregis, in his commercial discourses, (Disc. 24, n. 22) has the following remarks :—'*Verum tamen notandum* '*est quod si navis inimica onerata mercibus mercatorum amicorum aggressa* '*fuerit alteram inimicam et mercatores aut* domini mercium *operam ac* '*industriam dedissent pro ea aggredienda tunc merces dominorum cadunt* '*etiam sub præda, si navis predicta onerata mercibus fuerit deprædata,* '*&c. &c. et regulariter bona eorum qui auxilium inimices nostris præstant* '*vel confederati cum iis sunt, prædari possunt.*' It is obvious that Casaregis is here considering the case of an attack of an enemy merchant ship, laden with a neutral cargo, upon the ship of its enemy in which the former is unsuccessful and is captured. Under such circumstances he holds, that if the neutral shippers, or the persons having the management of the cargo (*domini mercium*) have aided in the attack, the cargo is forfeited, upon the ground that all who assist or confederate with an enemy are liable to be plundered by the law of war. He does not touch the case, where an enemy merchant ship simply makes resistance in her own defence, or resists the right of search ; nor how far the master of such ship is the *dominus mercium*, or can by his own acts bind the cargo. Much less has he discussed the question as to what acts amount to an incorporation into the objects and interests of the enemy, so as to affix a hostile character. It does not seem to me that his text can be an authority beyond the terms in which it is expressed. It pronounces affirmatively that a co-operation in an attack will induce confiscation of the cargo, (which cannot be doubted ;) but it does not pronounce negatively that the resistance of an enemy master will not draw after it the same penalty. And if it were otherwise, it would deserve consideration whether the opinion of a mere elementary writer, respectable as he may be, delivered at a time when the prize law was not as well settled as it has been in the present age, should be permitted to regulate the maritime rights of belligerent nations.

The argument then, on the footing of authority, fails, for none is produced which directly points at circumstances like those in the case at bar. And upon principle it seems quite as difficult to support it. I am unable | to perceive any solid foundation on which to rest a distinction p. 453
between the resistance of a neutral and of an enemy master. The injury to the belligerent is in both cases equally great, for it equally withdraws the neutral property from the right of search, unless acquired by superior force. And until it is established that an enemy protection legally suspends the right of search, it cannot be that resistance to such right should not be equally penal in each party. I have, therefore, no difficulty in holding that the resistance of the ship is, in all cases, the resistance of the cargo, and that it makes no difference whether she be armed or unarmed, commissioned or uncommissioned. He who puts his property

on the issue of battle, must stand or fall by the event of the contest. The law of neutrality is silent when arms are appealed to in order to decide rights; and the captor is entitled to the whole prize won by his gallantry and valor. This opinion is not the mere inference, strong as it seems to me to be, of general reasoning. It is fortified by the consideration that in the earliest rudiments of prize law, in the great maritime countries of Great Britain and France, confiscation is applied by way of penalty for resistance of search to all vessels without any discrimination of the national character of the vessels or cargoes. The black book of the admiralty expressly articulates that *any vessel* making resistance may be attacked and seized *as enemies*; and this rule is enforced in the memorable prize instructions of Henry VIII. *Clerk's Praxis* 164, *Rob. Collect. Marit. p.* 10, *and note, and p.* 118. The ordinance of France of 1584, is equally broad; and declares *all such vessels* good prize; and this has ever since remained a settled rule in the prize code of that nation.

Valin informs us that it is also the rule of Spain; and that in France it is applied as well to *French vessels* and cargoes as to those of neutrals, and allies, *Coll. Marit.* 118, *Valin Traits des Prizes, ch.* 5, § 8, *p.* 80. There is not to be found in the maritime code of any nation, or in any commentary thereon, the least glimmering of authority that distinguishes, in cases of resistance, the fate of the cargo, from that of the ship. If such a distinction could have been sustained, it is almost incredible that not a single ray of light should have beamed upon it during the long lapse of
p. 454 ages, in which maritime warfare | has engaged the world. And if any argument is to be drawn from the silence of authority, I know not under what circumstances it can be more forcibly applied than against the exception now contended for.

But even if it were conceded that a neutral shipper in a *general* ship might be protected, the concession would not assist the present Claimant. His interests were so completely mixed up and combined with the interests of the enemy; the master was so entirely his agent under the charter party, that it is impracticable to extract the case from the rule that stamps Mr. Pinto with a hostile character. The whole commercial enterprize was radically tainted with a hostile leaven. In its very essence it was a fraud upon belligerent rights. If, for a moment, it could be admitted that a neutral might lawfully ship goods in an armed ship of an enemy, or might charter such a ship, and navigate her with a neutral crew, these admissions would fall far short of succouring the Claimant. He must successfully contend for broader doctrines, for doctrines which, in my humble judgment, are of infinitely more dangerous tendency than any which Schlegel and Hubner, the champions of neutrality, have yet advanced into the field of maritime controversy. I cannot bring my mind to believe that a neutral can charter an armed enemy ship, and victual

and man her with an enemy crew, (for though furnished directly by the owner they are in effect paid and supported by the charterer) with the avowed knowledge and necessary intent that she should resist every enemy; that he can take on board hostile shipments on freight, commissions and profits; that he can stipulate expressly for the benefit and use of enemy convoy, and navigate during the voyage under its guns and protection; that he can be the entire projector and conductor of the voyage, and co-operate in all the plans of the owner to render resistance to search secure and effectual; and that yet, notwithstanding all this conduct, by the law of nations he may shelter his property from confiscation and claim the privileges of an inoffensive neutral. On the contrary, it seems to me that such conduct is utterly irreconcileable with the good faith of a friend, and unites all the qualities of the most odious hostility. It wears the habiliments of neutrality only when the sword and the armour of an enemy become useless | for defence. If it be, as it undoubtedly p. 455
is, a violation of neutrality to engage in the transport service of the enemy, or to carry his dispatches even on a neutral voyage, how much more so must it be to inlist all our own interests in his service, and hire his arms and his crew in order to prevent the exercise of those rights which, as neutrals, we are bound to submit to? The doctrine is founded in most perfect justice, that those who adhere to an enemy connexion shall share the fate of the enemy.

On the whole, in every view which I have been able to take of this subject, I am satisfied that the claim of Mr. Pinto must be rejected, and that his property is good prize to the captors. And in this opinion I am authorized to state that I have the concurrence of *one of my brethren*. It is matter of regret that in this conclusion I have the misfortune to differ from a majority of the Court, for whose superior learning and ability I entertain the most entire respect. But I hold it an indispensable duty not to surrender my own judgment, because a great weight of opinion is against me, a weight which no one can feel more sensibly than myself. Had this been an ordinary case I should have contented myself with silence; but believing that no more important or interesting question ever came before a prize tribunal, and that the national rights, suspended on it, are of infinite moment to the maritime world, I have thought it not unfit to pronounce my own opinion, diffident indeed of its fullness and accuracy of illustration, but entirely satisfied of the rectitude of its principles.

The Mary and Susan.—G. & H. Van Wagenen, claimants.

(1 Wheaton, 25) 1816.

Where goods were shipped in the enemy's country, in pursuance of orders from this country received before the declaration of war, but previous to the execution of the orders, the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to them, (the bankers,) and they also repeated the same request, the invoice being for account and risk of the consignees, but stating the goods to be then the property of the bankers, it was held, that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not devested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

APPEAL from the circuit court for the district of New-York. The goods in question were part of the cargo of the ship Mary and Susan, a merchant vessel of the United States, which was captured on the 3d of September, 1812, by the Tickler, a private armed vessel of the United States. The cargo was libelled as prize of war; this portion claimed by Messrs. G. & H. Van Wagenen, and condemned in the district court. In the circuit court this sentence was reversed, and restitution to the claimants was ordered; from which decree the captors appealed to this court. The cause having been heard in both the courts below, on the documentary evidence found on board, the original order for the goods
p. 26 does not appear. That they were shipped in consequence of | orders, is, however, sufficiently proved by the letters addressed to the claimants, and the other papers which accompanied them. These are, 1. An invoice headed in the words following:

'*Birmingham, 8th July*, 1812.
Say 15th March, 1811.

'Invoice of fourteen casks and four baskets of hardware, bought by Daniel Cross & Co. by order, and for account and risk, of G. & H. Van Wagenen, Merchants, New-York, marked and numbered as per margin, and forwarded on 4th March, 1811, to care of Martin, Hope, & Thornley, Liverpool, and by them afterwards transferred to the care of T. and W. Earle & Co. of Liverpool; which goods are now the property of Messrs. Spooner, Attwood & Co., Bankers, of Birmingham, to whom you will please to remit the amount of this invoice.'

And containing at the foot, after the enumeration of the articles and their prices in the usual form, the following charges:

' Amount of Invoice,				£1041	0	11 1-2
' Commission 5 per cent.				52	1	0 1-2
				£1093	2	0
Freight to Liverpool,	£12	18	0			
Entry and Town Dues,		6	0			
Cartage, porterage, and cooperage,	4	15	0			
Bill of Lading,		3	6			
Export Duty 4 per cent.	40	4	0			
Broker's Commission forwarding,	4	3	0			
	62	9	6			
Commission 5 per cent.	3	2	6			
				65	12	0
Insurance on the Mary and Susan. Amount and premium covered by £1300, at 2 1-2 guineas per cent. and policy 78s hillings,.	38	0	6			
Commission for effecting insurance at 1-2 per cent.	6	10	0			
				44	10	6
				£1203	4	6
Canal insurance to Liverpool 1-2 per ct. on £1041 0 11 1-2	5	4	0			
Insurance against fire,	6	15	0			
Warehouse rent in Liverpool,	15	0	0			
Twelve months Interest on £1041 0 11 1-2 at 5 per cent.	52	1	0			
				79	0	0
				£1282	4	6 '

p. 27

2. A bill of lading in the usual form, stating that the goods were shipped by Thomas and William Earle & Co. of Liverpool, to be delivered to the claimants, or to their assigns, in New-York. 3. The two following letters :

' *Birmingham, 8th July*, 1812.

' Messrs. G. & H. Van Wagenen.

' Gentlemen,

' In consequence of the revocation of the British Orders in Council, on the first day of August next, we have lost no time in shipping the goods sent to Liverpool so long since, agreeable to your kind order. They are in the Mary and Susan, a most beautiful new vessel, to sail in all this week ; the freights are very high, 70*s.* for measurement to New-York, and 80*s.* to Philadelphia, and at this moment nothing less will be taken. We, therefore, thought you would prefer to have the goods at this rate, rather than wait for a reduction in the freight, which, we doubt not, will soon take place. By the letter of our friends, Messrs. Spooner, Attwood & Co., herewith, you will perceive the interruption to commerce has been an inconvenience to us as young merchants ; but the unneighbourly conduct of the old house will only serve to prompt us to new exertion for our friends in the States, for whose interest nothing shall be omitted within our power. We shall certainly serve them as well, if not on better terms, than heretofore. We will not be

undersold. In a few days we shall send Mr. Oakley, for the use of our friends, a new and complete set of patterns, which, we trust, will meet with their approbation. Mr. O. and Messrs. B. W. Rogers & Co. will be able to give you more particulars respecting what has passed on this side. The amount of invoice herewith to your debt is 820*l.* 2*s.* 1*d.*, which, agreeable to the letter of Messrs. Spooner, Attwood & Co. you
p. 28 will please to remit to them on arrival of the goods ; | but hereafter things will move in the usual channel. Waiting your further favours,

'*We remain, Gentlemen, your most obedient servants,*

'DANIEL CROSS & Co.'

'*Birmingham, 9th July*, 1812.

'Messrs. G. & H. VAN WAGENEN, Merchants, New-York.

'GENTLEMEN,

'In consequence of the late unfortunate state of affairs between this country and the United States of America, great inconvenience and distress have naturally been experienced by the merchants and manufacturers here. Among others, our friends Messrs. Daniel Cross & Co. have been considerably embarrassed, and have received great relief and assistance from our house. We were induced to extend this assistance, as bankers, from motives of friendship and regard, and under the hope that the unnatural state of affairs between the two countries could not possibly last long ; but as it was necessary that our assistance should be very considerable, we thought it right to obtain from them an assignment of certain quantities of goods which they had provided on account of your house, and of several others in the United States, previous to the 2d of February, 1811. We are thus introduced to your acquaintance, and we beg leave to send you herewith an invoice of the goods which Messrs. Daniel Cross & Co. had purchased for your account, and which are now forwarded to you, requesting that you will remit the amount, 820*l.* 2*s.* 2*d.*, *to us* at your earliest convenience. We cannot conclude this letter without expressing our satisfaction at the services we have had the opportunity of rendering to Messrs. Daniel Cross & Co., whom we consider to be persons of the greatest integrity and knowledge of business, and without earnestly recommending them to your future attention. We are convinced that their late difficulties will not at all affect their future proceedings, and that they will henceforth be enabled to carry on their business in the same regular and punctual way as they have formerly done ; and we cannot but flatter ourselves, that as the orders in council are now revoked, and the British government has become alive to the true interest of the British people, the natural relations between the two countries will long continue, and that the connexion between your respectable house and Messrs. Daniel Cross & Co. will be productive of permanent and mutual advantages. With best wishes for your prosperity and happiness, and that of your country,

'*We are, respectfully, Gentlemen, your obedient humble servants,*

'SPOONER, ATTWOOD & Co. *Bankers, Birmingham.*

'Messrs. G. & H. VAN WAGENEN, Merchants, New-York.' |

Hoffman, for the appellants and captors. 1st. Probably a delivery p. 29
from Cross & Co. to the ship master would have been, in contemplation of law, a delivery to the claimants. But Attwood & Co. were the shippers, between whom and the claimants there was no privity. There is no proof that Cross & Co. ever accepted the order or commission sent to them by the claimants. There was a sale and delivery of the goods from Cross & Co. to Attwood & Co., and the order was executed by strangers to the claimants. Could any action have been maintained by the claimants against Attwood & Co.? None could have been maintained, even against Cross & Co. Possibly, if they had agreed to accept the commission, a special action on the case might have been brought against them as factors. But by the assignment to the bankers they disabled themselves from executing the order. The bankers did not acquire the mere *lien;* they would not have been secure without the absolute dominion of property. They were not obliged to ship, nor the claimants to receive. Both parties might, or not, according to their interest. Suppose the goods had been lost in their transit, could Attwood & Co. have maintained an action for the price against the consignees? I anticipate the unanimous answer of the court in the negative. Suppose the goods should be condemned as prize of war, could the bankers recover against the claimants? No! neither in consequence of a physical nor a legal loss. The case of Dunham & Randolph[1] is conclusive of the present. Attwood | & Co. exercised acts of ownership on p. 30
the goods after the transfer to them, and until the lading on board. The claimants could not have received the goods without paying Attwood & Co. They may have had an interest in paying Cross & Co., their correspondents, who may have had their funds in possession—who may have been their debtors. They had an election precisely as the claimants in the Frances had.

Dexter, for the respondents and claimants. The possession of the goods was continued in Cross & Co. by their agents at Liverpool, Earl & Co., who shipped as *their*, and, consequently, as *our* agents, on board a general ship, to us, for our account and risk. When the goods were first put in motion, their transit to New-York began, and they were, in effect, delivered to the consignees at that port. Some act of the correspondent in Europe may be necessary to show that he elects to consider the goods, after being purchased of the manufacturer, as the property of the merchant in America. But such an act existed in this case; and the property changed when the goods were delivered to the common carrier on the canal from Birmingham to Liverpool, *i. e.* in 1811. The carrier was the bailee of the consignees in law, and the goods were at their risk from that time. It may be true that the bankers cannot main-

[1] Case of the Frances, Feb. Term, 1814, and 1815.

tain a suit against us; but it may be true that the property, nevertheless, vests in us. The only doubt whether such a suit could be maintained, is, that the debt due to Cross & Co. being a chose in action, could not
p. 31 be transferred. Still, the right to it subsists in them, | who may sue the claimants on account of the advances made by order from them. It is, therefore, immaterial which of the two parties in England may maintain the action. Except for the intervention of the capture and prize proceedings, the goods are delivered, and the claimants are debtors for the price. A bill of lading drawn in consequence of an order to ship goods, transfers the property to the consignee. There is no copy of what is termed the assignment; but it is easy to see that its object was not to defeat the arrangement, or the subsisting relations of creditor and debtor between Cross & Co. and the claimants; but merely to enable the bankers to receive their money from the consignees. Either the assignment was a sale, or a mere naked authority to receive payment from the claimants. If a sale, then was it invalid for want of delivery; if an authority only, then the right of property remains where it was, though it is possible the bankers would have been entitled, in equity, to receive the money. The expression in the heading of the invoice, 'which goods are now the property of Messrs. Spooner, Attwood & Co.,' only proves them to be bad lawyers and bad logicians. Probably they are ignorant of the distinction between general and special property. The *res gestæ* do not warrant a pretension of general property in them, and we deny the conclusion they have drawn. Nothing passed but a right to receive the price of the goods. They had not even a lien, or other legal right, because they never had the possession; and, in whatever way they might have enforced their claim, they meant nothing more
p. 32 by it than a | confident expectation, founded on mercantile courtesy, that the claimants would pay them. The original arrangement was to subsist, and Cross & Co. were, in fact, the shippers. Even supposing they have not fulfilled our order literally and strictly; suppose a right of election in the consignees to receive or reject the goods; are we not to wait for this election? Can they lose the property before this election is made? An irregularity or defect in the execution of their order may give them a right of action against their correspondents in a court of municipal law for damages; but if the rule of the prize court be, that the property must be vested in the claimants at the time of shipment, they are entitled to restitution in the present case.

Pinkney, for the appellants and captors, in reply. The question is, in whom did the property vest at the time of shipment, or at the time of capture? The claimants could not make an efficacious election after capture, because the rights of the captors interposed before any election could be made. If these rights had not thus interposed, then the power

of election might be exerted. Therefore, the question stated is the only controversy in the cause. Take the transaction by its stages; break it up into its constituent parts: at what epoch—through the instrumentality of what circumstances, did the property pass to the claimants? If it did not so pass, it was, on the ocean, the property of an enemy, and, therefore, liable to capture and confiscation. The orders are not here; but will the documentary evidence, now before the | court, justify p. 33
restitution? 1. Did, then, the first purchase vest the property in the claimants? In the Frances, it was determined, that it had no such effect; and the doctrine is upheld by all principle and all analogy. 2. The goods were sent to Liverpool, and they still remained the property of Cross & Co. The delivery in the vehicle on the canal was inland, and preparatory to the maritime delivery. The agents of Cross & Co. at the outport were not agents of the claimants, nor liable to them in an action. The claimants were not bound, nor could they take possession at this epoch. Suppose Cross & Co. had become bankrupt, would the goods have vested in them? or would they have been obliged to ship? 3. Consider the legal effect and circumstances of the assignment. Cross & Co. were the complete proprietors of the goods, and the present claimants could not have shown themselves in a court of justice. The parties considered the transfer to have changed the property, and they knew better what they had done than the court can know. It must, therefore, have been calculated and adapted to change the property; the bankers could have had no indemnity otherwise. They must have had a discretion to dispose of the goods; and had they become bankrupts, their assignees must have had the same discretion. There is always a *locus penitentiæ* in the vendor before delivery; (as to the right of property I mean, not as to the right of action in the vendee;) the caprice of the vendor may influence him to change the direction of the property. Had the right of the claimants been a vested right, the vendor in England might | have brought an action against them at any stage of the trans- p. 34
action. At what epoch could either he or the bankers have brought such an action? The remaining question is as to the concurrent acts of both. Did those acts vest a right to the price in either? or was it in the election of the claimants to receive the commodities? The intervening assignment to the bankers sundered the merchants in England from the claimants; it deprived them of their ability to obey the original order; all privity of contract between the principal and agent was gone. There was no obligation on the part of Attwood & Co. to ship; no authority; no power; no right! How is it that the rights of war on the property are to be defeated? By showing an authority to ship? It exists not. The question is *stricti juris;* the claimants are not bound to acquiesce in the new state of this transaction; they have an election to do so

or not. Had the goods arrived without interruption at their port of destination, the claimants might have accepted them, and thus adopted the new state of the transaction, and the new parties to it. But the rights of war intercept transfer. The consignees are not liable for the retrospective charges at the foot of the invoice, unless the goods had been shipped by the agent, and received by the principal. The usage of trade is, that the factor always charges these expenses; were it otherwise, it would follow that the property would always be transferred on the first purchase, contrary to the express authority of the Frances, with which the present case coincides in principle. |

p. 35 *February 13th.*

MARSHALL, Ch. J., delivered the opinion of the court, and, after reciting the documentary evidence, proceeded as follows:

Upon these papers it is contended by the captors, that the goods remained the property of Daniel Cross & Co. until the transfer to Spooner, Attwood & Co., when they became the property of the assignees; that this change of property so operates upon the subsequent shipment as to make it a shipment without order, and to leave it in the election of G. & H. Van Wagenen, to accept or reject the goods; and that this right of election is terminated by the intervening right of the captors.

On the part of the claimants it is contended, that their right commenced with the purchase, which was made by their order, and for their account and risk, and was completed when the goods were forwarded to Liverpool: that if this point be determined against them, still the whole transaction evidences an intention to assign the claim of Daniel Cross & Co. to Spooner, Attwood & Co., so as to give them a right to receive the money, but not in any manner to affect the interests of G. & H. Van Wagenen.

Whether Messrs. G. & H. Van Wagenen became the owners of the goods on their being sent from Birmingham to Liverpool, must depend on the orders under which Daniel Cross & Co. acted. If their authority was general to ship to G. & H. Van Wagenen, the goods might, according to the circumstances of the purchase, remain the property of Daniel Cross & Co. until they were delivered to the master of the vessel for the
p. 36 purpose of transportation. | If they were directed to purchase the goods, and to store them in Liverpool as the goods of G. & H. Van Wagenen, to be afterwards shipped to the United States, it appears to the court that the property changed on being sent to Liverpool, and immediately vested in the American merchants for whom they were purchased. The testimony respecting the orders is found in the letter from Daniel Cross & Co. to G. & H. Van Wagenen. The words of that letter which bear particularly on this point are, 'In consequence of the revocation of the British Orders in Council, on the first day of August next, we have lost

no time in shipping the goods sent to Liverpool so long since, agreeably to your kind order.' This language is not equivocal. It imports, in terms not to be misunderstood, that the goods were sent from Birmingham to Liverpool, in consequence of the orders of Messrs. G. & H. Van Wagenen. This letter is addressed to the house which had given the order, and was written without an existing motive for misrepresenting that order. There is certainly nothing in the circumstances of the transaction which would render it probable that the order must be represented in this letter, either carelessly or intentionally, in any manner different from that which was really given. The situation of this country during what has been termed our restrictive system was notoriously such as to render it an object with every importing merchant to use the utmost despatch in bringing in his goods so soon as they should be legally admissible. Nothing, therefore, can be more probable than that orders for making purchases | which were to be executed at an inland place, by p. 37
a house residing at such place, would be accompanied with orders directing them to be conveyed to a seaport, there to be held in perfect readiness for exportation. In the usual course of trade, if the purchasing and shipping merchant be the same, there would rarely be any actual change of property between the purchase and the shipment of the articles, nor could we expect to find any extrinsic evidence of ownership, other than the mere possession ; but in the state of trade which existed at the time of this transaction, such change, and the evidence of it, may be reasonably expected. In the common state of things, the whole order respecting purchase and shipment, where the same agent is employed, is executed with expedition, and is, in appearance, one transaction. In the actual state of things, the purchase was to be made immediately, but the shipment was to take place at some future indefinite period. It would depend on an event which might be very near or very remote. It became a divided transaction, or, rather, two distinct operations. We look for some intervening evidence of ownership in the person for whom the purchase was made, and are not surprised at finding it. If, in such a state of things, the goods were procured under a general order to purchase, but not to ship until some future uncertain event should occur, and were, in the mean time, to remain the property, and at the risk of the agent, they would probably be retained at the place of purchase under his immediate control and inspection. Their conveyance to a seaport, there to be stored until their importation | into the United p. 38
States should be allowed, was such a fact as would scarcely have taken place without special orders, in the course of which an actual investment of the property in the person by whose order, and for whose use, the goods were purchased and stored at a seaport, is not unreasonably to be expected. The court considers this letter, then, as proving incontestibly

that the goods were conveyed to Liverpool, and there stored, to be shipped on the happening of some future event which it was supposed would restore the commercial intercourse between the two countries, in pursuance of specific orders from the claimants; and is further of opinion, that the transaction itself furnishes strong intrinsic evidence that the goods, when stored in Liverpool, were the goods of the claimants, subject to that control over them which Daniel Cross & Co. would have as the purchasers, and intended shippers, who had advanced the money with which they were purchased. However this control and lien might be used for their own security, it could not be wantonly used to the destruction of the property of G. & H. Van Wagenen, and any conveyance to a person having notice of their rights ought to operate, and be considered as intended to operate, consistently with them, so far as the two rights could consist with each other. The words, then, in the invoice, which represent the goods as the property of Spooner, Attwood & Co., are introduced with no other object than to secure the payment of the purchase money to them. The invoice made out by Spooner, Attwood & Co. themselves, states the merchandise it specifies to have |
p. 39 been purchased by Daniel Cross & Co., by order, and on account and risk of Messrs. G. & H. Van Wagenen, and to have been forwarded to Liverpool more than 12 months anterior to the date of the shipment. Goods thus purchased, and thus conveyed to a seaport, and stored under the orders of the American merchant, may well be considered as leaving in the purchasing agent only the lien which a factor has to secure the payment of the money which is due to him. If this was the true state of the property at the time of the assignment to Spooner, Attwood & Co., they having full notice that the assignment could only operate as an order for G. & H. Van Wagenen to pay the money to them, (Spooner, Attwood & Co.) and would, probably, in its form and expressions, manifest this idea.

The court is much inclined to the opinion, that these goods became the property of the claimants on being stored in Liverpool, if not at an antecedent time. The question, however, would, undoubtedly, be affected by the order under which Daniel Cross & Co. acted; by the deed of assignment to Spooner, Attwood & Co.; and by other papers which are attainable. If, therefore, the case depended entirely upon this point, farther proof might be required. But, in the opinion of the majority of the court, the case does not depend on this point alone.

If the goods were shipped in pursuance of the orders given by G. & H. Van Wagenen, the delivery on board the ship was a delivery to them; the property was vested in them by that act, and they had no election to accept or reject it. |

p. 40 In pursuing this inquiry, the legal effect of the transaction must depend, in a considerable degree, on the intent of the parties, and that

intent is, in this case, to be collected chiefly from their letters, and from the circumstances in which they stood. G. & H. Van Wagenen were American merchants desirous of receiving the goods they had ordered as soon as the importation of those goods should be allowed. Daniel Cross & Co. were commission merchants of Birmingham, engaged in the American business. Spooner, Attwood & Co. were bankers, friendly to Daniel Cross & Co.; were desirous of promoting their interests, and recommending them to business, and had advanced them money while embarrassed by the difficulties consequent on the state of trade between the United States and Great Britain. Spooner, Attwood & Co. were desirous, not of purchasing the goods stored at Liverpool by Cross & Co. for the claimants; not of interrupting the shipment of those goods, or the connexion between Daniel Cross & Co. and G. & H. Van Wagenen; but of permitting the shipment to proceed, and of receiving, themselves, the money to which Cross & Co. were entitled. Such was the situation, and such the objects of all the parties: keeping this situation and these objects in view, let the testimony be examined. The letter of Daniel Cross & Co., dated the 8th of July, 1812, is in the language of men who were themselves the shippers of the goods. 'We have lost no time,' they say, 'in shipping the goods, sent to Liverpool so long since, agreeably to your kind order.' They speak of the vessel and of the freight, | as if the vessel were selected, and the contract made, by themselves. p. 41
'We thought you would prefer to have the goods at this rate, rather than wait for a reduction in the freight.' They next refer to the letter of their friends, Spooner, Attwood & Co., to show the inconvenience they had sustained as young merchants, but without any indication of an interference of that house in the shipment, and conclude with saying, 'the amount of invoice, herewith, to your debit, is 820*l.* 2*s.* 1*d.*, which, agreeably to the letter of Spooner, Attwood & Co., you will please to remit to them on arrival of the goods.' This is the letter of an agent who has executed, completely, the order which had been given him; but who, having been compelled to borrow money, had transferred his pecuniary claims to his creditor. The letter of Spooner, Attwood & Co. will next be considered. It is dated the day after that written by Daniel Cross & Co. After stating their friendship for Daniel Cross & Co., and the aid afforded that house, they add: 'but as it was necessary that our assistance should be very considerable, we thought it right to obtain from them an assignment of certain quantities of goods which they had provided on account of your house, and of several others in the United States, previous to the 2d of February, 1811. We are thus introduced to your acquaintance, and we beg leave to send you herewith an invoice of the goods Daniel Cross & Co. had purchased for your account, and which we now forward to you, requesting that you will remit the amount of 820*l.* 2*s.* 1*d.*

p. 42 to us at your earliest convenience.' | Nothing is said in this letter respecting the vessel by which the goods were sent; nothing indicating the exercise of any judgment by Spooner, Attwood & Co., respecting the time or manner of sending them; nor any thing which would lead to the opinion that they interfered, in any manner whatever, in the transaction of the business. On comparing the two letters, the inference is inevitable, that Daniel Cross & Co. continued to execute the order of G. & H. Van Wagenen, in like manner as if their affairs had never been embarrassed. The contents of the two letters, in conformity with the situation and views of the parties, prove, that Daniel Cross & Co. had only transferred to Spooner, Attwood & Co. their right to receive payment for the goods, and that the arrangements between them were intended only to secure that object. The assignment of the goods mentioned in the letter of Spooner, Attwood & Co. does not appear from the context, and from the nature of the transaction, to be intended to convey the idea of a sale, but to be used in rather a different sense, as an assignment of the adventure, or of the right to the debt due from G. & H. Van Wagenen. Whatever may have been the form of this assignment, it is apparent that it could not have been made, and certainly was not made, with the intention of enabling Spooner, Attwood & Co. to defeat the shipment to G. & H. Van Wagenen, or to control the proceedings of Daniel Cross & Co., under the order they had received. Why, then, are the goods, when put on board the Mary and Susan, in pursuance of the
p. 43 orders of the claimants, | to be considered not their property, but as the property of Spooner, Attwood & Co.? It is said that they were shipped by Spooner, Attwood & Co., not by Daniel Cross & Co.; that the confidence implied in the order for purchase and shipment was personal, and could not be transferred or executed by another. Allow to this argument all the weight which is claimed for it by the counsel for the captors; what part of this personal trust was transferred? What part of the order was executed by any other than Daniel Cross & Co.? The goods were purchased, sent to Liverpool, stored, and, afterwards, shipped by them. Every other auxiliary part of the transaction was performed by them. Nothing appears to have been done in pursuance of orders from Spooner, Attwood & Co., but every thing in pursuance of their own judgment, acting under the order received from G. & H. Van Wagenen. On this ground the claimants could raise no objections to the conduct of Daniel Cross & Co. But it is said, that Daniel Cross & Co. might have had the funds of G. & H. Van Wagenen in their hands, in which case the claimants would have been compelled, by receiving the goods, to pay their amount to Spooner, Attwood & Co.; consequently, this assignment must be considered as creating in Spooner, Attwood & Co. new rights, which released G. & H. Van Wagenen, from the

obligation to receive the cargo. But Daniel Cross & Co. did not purchase with the funds of the claimants. They purchased with their own funds. They inflicted, therefore, no injury on the claimants by transferring their right to the money | to Spooner, Attwood & Co. The effect of the p. 44
transaction is precisely the same as if they had drawn a bill in favour of Spooner, Attwood & Co. for the amount of the invoice. It is said that the assignment gave Spooner, Attwood & Co. an election to ship the goods, or to dispose of them otherwise, and that the necessary consequence of this power of election, is a correspondent right of election in G. & H. Van Wagenen to receive or reject them. The court does not view the transaction in this light. The assignment to Spooner, Attwood & Co. is understood by the court, from the evidence furnished by the letters, and the circumstances and objects of the parties, to have been subject to the right of Daniel Cross & Co. to execute, completely, the order of the claimants. The interests of all parties were best promoted by pursuing this course, and they appear to have pursued it. The court perceives nothing which can justify the opinion that Spooner, Attwood & Co. had a right, or would have been permitted, to intercept the shipment. Certainly it was neither their wish nor their interest to interrupt it. It is not reasonable, therefore, to suppose, that they would have created any difficulty in obtaining a right to claim the amount of the invoice from G. & H. Van Wagenen, by insisting on such an assignment as Daniel Cross & Co. would have been unwilling to make, because it might have proved injurious to them, without benefiting the house they meant to secure. It has also been argued, that the orders most probably directed a shipment of the goods when the non-intercourse should be removed, | and that a shipment before that time was without p. 45
orders, and at the risk of the shipper. The court does not think this probable. It is well known that the continuance of the laws of non-intercourse was considered as depending on the continuance of the orders in council. It is, also, perfectly clear, that the American merchant, who should permit his goods to remain in Great Britain until intelligence of the repeal of the non-intercourse laws could be conveyed from this country to that, would be anticipated by all others, and would bring them to a market already supplied. Nothing, therefore, would be more reasonable than to order them to be shipped on the revocation of the orders in council. This idea is supported by the letter of Daniel Cross & Co. That letter indicates no doubt of the propriety of the shipment.

Upon a view of the whole case, the majority of the court is of opinion, that this is not a case in which farther proof ought to be required, and that the goods by the Mary and Susan were shipped in pursuance of the orders of the claimants, and became their property when delivered, for their use, to the master of the vessel, if not at an earlier period.

Sentence of the circuit court affirmed with costs.

The Mary and Susan.—Richardson, claimant.

(1 Wheaton, 46) 1816.

Goods, the property of merchants actually domiciled in the enemy's country at the breaking out of a war, are subject to capture and confiscation as prize.

The fact, that the commander of a private armed vessel was an alien enemy at the time of the capture made by him, does not invalidate such capture.

The President's instructions of the 28th August, 1812, prohibiting the interruption of vessels coming from Great Britain, in consequence of the supposed repeal of the British Orders in Council, must have been actually known to the commanders of vessels of war, at or before the seizure, in order to invalidate captures made contrary to the letter and spirit of the instructions.

APPEAL from the Circuit Court for the district of New-York. This was a claim by Mr. Richardson for a portion of the cargo of the same ship mentioned in the preceding cause, which portion was condemned in the district and circuit courts. The claimant, a native of Great Britain, and a naturalized citizen of the United States, was a resident merchant of Liverpool at the breaking out of the late war, but returned to this country in the month of May, 1813, after knowledge of the capture, and pending the proceedings in the district court. The capture was made on the 3d of September, 1812, within 18 miles of Sandy Hook, in 13 fathoms of water, where vessels are frequently passing and anchoring, and the privateer had previously spoken at sea another privateer
p. 47 and a pilot boat schooner from Philadelphia. | There was also contradictory testimony as to whether the commander of the privateer had knowledge of the president's additional instructions of the 26th of August, 1812, before the capture, which, as it is noticed in the opinion of the court, it is unnecessary to state. By those instructions the public and private armed vessels of the United States were not to interrupt any vessels belonging to citizens of the United States, coming from British ports to the United States, laden with British merchandise, in consequence of the alleged repeal of the British Orders in Council, but were, on the contrary, to give aid and assistance to the same, in order that such vessels and their cargoes might be dealt with on their arrival as might be decided by the competent authorities.

Stockton, for the appellant and claimant, stated, that this was a case of *summum jus*, where the property of a citizen, shipped without knowledge of the war, upon the repeal of the British Orders in Council, was condemned upon the authority of the Venus,[1] and the doctrine of domicil. There is here no question of proprietary interest, or of national character, independent of this particular transaction. But, unless the court thinks proper to review its decisions upon the effect of commercial

[1] February Term, 1814.

domicil, the appellant is confined to three points in support of his claim :

1st. That the capture was made after the commander of the privateer had knowledge of the instructions of the 26th of August, 1812. |

2d. That if he had not such knowledge, condemnation cannot p. 48
take place, as the capture was made subsequent to the issuing of the instructions.

3d. That the commander of the privateer is, and was at the time of the capture, an alien enemy, and, consequently, his commission is void.

1. This is a question of fact, to be determined by the weight of testimony. 2. The instructions were certainly communicated to the commander before prize proceedings were commenced, and it was the duty of the captors to have relinquished the property, subject to the decision of government, under the Non-Importation Act. Capture does not vest the property of the goods in the captors, but merely authorizes them to carry in for adjudication. The Prize Act of the 26th of June, 1812, sect. 6., shows that the property is not vested in them until after condemnation. All laws take effect from their enactment, as to rights of property ; and at common law, statutes take effect, by a fiction, from the first day of the session at which they are passed. The instructions, issued under the 8th section of the Prize Act, are legislative in their nature. Captors are the mere delegates and substitutes of the sovereign ; their authority is derived from him, and must be exercised in conformity with the will of the state.[1] The power of the president to issue these instructions, has already been recognized by the court. The rights of war and peace depend upon the *fact* of the existence of a state of war and peace, | not upon the *knowledge* of that fact. A prize made after a declara- p. 49
tion of war, without knowledge of its existence, is good ; and a prize made after the cessation of hostilities is bad, without regard to the circumstance of knowledge ; unless, indeed, there be a stipulation in the treaty of peace to prolong hostilities at sea.[2] 3. The commission to Johnson, the commander of the privateer, is null. The President has been deceived in his grant ; for he could never have intended to commissionate a person to commit treason against his own country. The acts of congress, during the late war, put alien enemies under restraints which are altogether opposed to the idea of the executive being authorized to delegate to them such a power as letters of marque and reprisal import.

Hoffman, for the respondents and captors. It is supposed that the question, as to the application of the law of domicil to this case, is at rest.

[MARSHALL, Ch. J. The court considers that question completely settled, and not open for argument.]

[1] 2 *Azuni*, part 2. c. 5. art. 3. sect. 4. 5. 7. 10.
[2] 2 *Azuni*, part 2. c. 4. art. 1. sect. 9. 11.

Hoffman. 1. As to the instructions. It is admitted that the former decisions of the court make them obligatory. The instructions could, in fact, have been communicated to the commander of the privateer previous to the capture; and they are not, *ipso facto*, and *per se*, revocatory
p. 50 of the right to capture. | The instructions must either have been actually communicated, or the privateer must have been in port after they were promulgated, in order to affect the right to capture. Such is the spirit of the former decisions.[1] Cruisers are not to act upon informal information at sea, as they might be deceived by their rivals and competitors; in port, knowledge must be implied, in law, from the certainty, publicity, and notoriety of the fact. The right of property does vest, by capture, to be subsequently consummated by condemnation; *quoad*, the belligerants the right vests; the property of the enemy is devested as to his rights. The claimant is an enemy, *pro hac vice*. 2. The affidavits to prove the commander of the privateer an alien enemy, were irregularly taken. The cause was open, as it were, to plea and proof; but the farther proof was confined to the communication of the instructions; and the simplicity of the prize proceedings forbids going out of the limits prescribed in the order for farther proof.

Pinkney, on the same side. The court will not regard the particular hardship of the case, but will only be anxious to administer the law of nations and of the land, as they are applicable to the rights of the parties. 1. Knowledge of the instructions was communicated to the captor, before the *deductio infra præsidia;* before the prize proceedings were commenced; before condemnation; but *after* the seizure, which vested an inchoate right in the captor. It is said, the written law prohibited
p. 51 him from making it; | but *that* is settled, and the court have said, the instructions were not to be likened to statutes. They are merely directory from a superior to a person in a subordinate capacity; and they must be received by him, or they cannot have the binding force of instructions; they were not law until communicated: then only they rise into law. It is also said, that the capture was well made, but subsequent knowledge shall overreach and vitiate it. In every case of capture of goods, in their transit to this country, after the repeal of the British orders in council, the same fact must have been known before condemnation. The instructions inhibited the *capture and interruption* of American vessels coming from British ports; but the President could have no authority to devest rights once vested; and there is nothing in the instructions to prohibit bringing in for adjudication after the capture was made, nor to prohibit prize proceedings after bringing in for adjudication. By the 4th section of the Prize Act, it is provided, 'That all *captures and prizes* of vessels and property, shall be forfeited, and *shall accrue* to the owners, officers,

[1] *Wheaton on Captures*, 48.

and crews, of the vessels by whom such captures and prizes shall be made; and, *on due condemnation had, shall be distributed,'* &c.; by which an inchoate right vested on the capture, to be consummated by condemnation. The prize law of France and Spain vests the property immediately; other countries require bringing *infra præsidium* and condemnation. Capture gives, everywhere, a right to privateers, though it may not give an indefeasible right to public ships. A qualified and provisional | property is vested; and it is held, both in France and England, p. 52
that the crown cannot interfere to stop prize proceedings where private parties have an interest. Admit that no right of *property* is acquired, is *no* right acquired? Most certainly an incipient right is acquired, to be afterwards consummated; and the instructions cannot have the effect, *retroactively*, to defeat the right of the captors to proceed to adjudication. The case of a treaty of peace, stated on the other side, illustrates this idea. *Belief* is nothing; *fact* is every thing. The captor exercises a belligerant right; the treaty repeals his commission and abrogates his right. Suppose a capture made the day before the treaty is signed, does it prevent his going on and perfecting his right? Certainly not; and the same is the case with the instructions: if they do not stand in the way of the capture, they do not stand in the way of condemnation. They did not stand in the way of capture, because they were unknown; they do not stand in the way of condemnation, because that is a mere consummation of the incipient right acquired by capture. 2. The court have no right to look beyond the President's commission; the captor stands everywhere upon it, especially in the prize courts of the power by whom it is issued; and there is no case where the contrary was ever maintained.

Dexter, for the appellant and claimant. 1. It is said the claimant must either prove that the privateer had been in port, *or* that the instructions were | actually communicated to the commander. If it were in- p. 53
tended to make him a wrong doer, strict proof of knowledge might be essential; without such proof, he would be excusable from paying costs and damages; but he does not thereby acquire any indefeasible right to the thing captured; and restitution must be ordered. The claimant seeks restitution only, and the first question is, whether the captor had knowledge of the issuing of the instructions, no matter how it came to him. 2. But supposing that he had not this knowledge *before* the seizure; it was communicated to the prize master while he was carrying in the ship for adjudication. He was bound by the instructions, 'not to interrupt, but, on the contrary, to give aid and assistance' to the ship he captured. Does the right to proceed contrary to the instructions vest at the time of boarding, or manning? It undoubtedly vested when the ship was completely brought *infra præsidia*. But the acts done in the

intermediate time between *that*, and the taking possession, constituted an *interruption* contrary to the letter and spirit of the instructions. The right acquired by the seizure was inchoate, and was sought to be consummated after the rule of conduct prescribed by the President became known to the captor. The rule as to capture vesting the property is various and fluctuating in different times and nations. The distinction here is, that an *inchoate* right may be defeated by a knowledge of the instructions subsequently communicated; but a *consummated* right cannot. The President has authority, both by our municipal constitu-
p. 54 tion and public law, to prosecute | a war lawfully declared; he may exempt this or that thing from attack or capture, by land or by sea. Suppose an enterprise commenced before knowledge of an order from him countermanding it, could the blockade, or siege, or expedition, be continued after such revocation became known? The captor has acquired, in the present case, no private right which the instructions cannot defeat. Government may, by compact with foreign nations, devest inchoate rights; in a treaty of peace, restitution of captures on both sides may be stipulated.[1] 3. The order for farther proof justifies the admission of testimony as to the alien enemy character of the commander. The president's commission is, doubtless, conclusive, wherever he acts within the authority confided to him by the laws; but he cannot commission an alien enemy, whose sovereign would have a right to punish him as a traitor; and even a naturalized citizen has no right to cruise against his native country.

February 13th.

JOHNSON, J., delivered the opinion of the court.

It is not necessary to go into a consideration of the national character or future designs of the claimant in this case. It has been solemnly settled, and must henceforth be considered as the positive law of this court, that shipments made by merchants, actually domiciled in the enemy's country at the breaking out of a war, partake of the nature of |
p. 55 enemy trade, and, as such, are subject to belligerant capture. Whatever doubts may have once been entertained on this bench, with regard to the necessity or propriety of adopting the principle into the jurisprudence of this country, they are now either dissipated or discarded; and the character, views, and even the subsequent acts of such a shipper, cannot vary the conclusion of law upon his claim.[2] |

[1] Vide Convention of 1800, between the United States and the French Republic; by the 30th article of which, restitution of public ships captured on both sides was stipulated.

[2] The effect of domicil, or commercial inhabitancy, upon national character was recognised by the Continental Court of Appeals in Prize Causes during the war of the revolution. (2 *Dallas*, 42. Claim of Mr. Vantelenger.) It was determined by the supreme court, during the hostilities with France, that a citizen residing in a foreign neutral country acquired the commercial privileges attached to his domicil, and was, consequently, exempt from the operation of the law of his own country

Stress has been laid, in the argument before this court, on the fact p. 56
that Charles Johnson, the commander of the Tickler, is an alien enemy,
but on this point we are unanimous that it makes no difference | in the p. 57
case. Admitting that this circumstance should bear at all upon the decision of the court, the utmost that could result from it would be the condemnation of his interest to the government as a droit of admiralty. The owners and crew of the Tickler are as much parties in this court as the commander, and his national character can in nowise affect their rights. But this court can see no reason why an alien enemy should not be commissioned as commander of a privateer. There is no positive law prohibiting it; and it has been the universal practice of nations to employ foreigners, and even deserters, to fight their battles. Such an

suspending the intercourse with the French dominions. (2 *Cranch*, 65. Murray v. The Charming Betsey.) The national legislature have adopted the same principle in the act of the 3d of March, 1800, applying the rule of reciprocity in cases of salvage to 'the vessels or goods of persons permanently resident within the territory, and under the protection, of any foreign government,' &c.; and, finally, before the case of the Venus, the supreme court applied the same principle to the law of insurance, and held a warranty of neutrality to be satisfied by the residence of the party as a merchant in a neutral country. (Livingston and Gilchrist v. The Maryland Insurance Company. February Term, 1813.) This was an action on a policy of insurance, containing a warranty that the property was neutral. That warranty was determined to be satisfied by the emigration of the party, a Spanish subject, to the United States, and residing there before the breaking out of the war in 1804, between Great Britain and Spain, the property having been captured by a British cruiser, and condemned in the prize court at Halifax as Spanish property. A majority of the court were of opinion, that the insured was to be considered as a merchant of the United States, whether he carried on trade generally, or confined himself to a trade from the United States to the Spanish provinces.

See, also, 1 *Johns. Cas.* 363. Arnold v. The United Insurance Company; 1 *Caines' Rep.* 60. Jenks v. Hallett; 2 *Johns. Cas.* 481. Johnston v. Ludlow; 1 *Caines' Cas. in Error*, 29., 2 *Johns. Cas.* 476. Duguet v. Rhinelander *et al.* It is much to be lamented, that we have not printed reports of the decisions in the British supreme court of prize, as many interesting points have been decided before the Lords of Appeal, of which we have no other account than occasional loose references to them. Among these is the case of Mr. Dutilth, mentioned by Dr. Robinson in the Indian Chief, 3 *Adm. Rep.* 21., which is more particularly stated by Sir John Nicholl, in a manuscript report, in the possession of the editor, of the hearing of the case of the Harmony, Bool, before the Lords, 7th of July, 1803. 'The case of Dutilth, also, illustrates the present. He came over to Europe, as it is stated, in 1793, about the end of July, a time when there was a great deal of alarm on account of the state of commerce in Europe. He went to Holland, then not only in a state of amity, but also of alliance with this country; he continued there until the French entered. During the whole time he was there, he was without any establishment. He had no counting house; he had no contracts nor dealings with contractors there. He employed merchants there to sell his property, paying them a commission. Upon the French entering into Holland he applied for advice, to know what was left for him to do under the circumstances, having remained there on account of the doubtful state of mercantile credit, which not only affected Dutch and American, but English houses, who were all looking after the state of credit in that country. In 1794, when the French came there, Mr. Dutilth applied to Mr. Adams, who advised him to stay until he could get a passport. He continued there until the latter end of that year, and having wound up his concerns he came away. Some part of his property was captured before he came there. That part which was taken before he came there was restored to him, (The Fair American, Adm. 1796,) but that part which was taken while he was there was condemned, and that because he was in Holland at the time of the capture.' (The Hannibal and Pomona, Lords, 1800.)

individual knows his fate should he fall into the hands of the enemy; and the right to punish in such case is acquiesced in by all nations. But, unrestrained by positive law, we can see no reason why this government should be incapacitated to delegate the exercise of the rights of war to any individual who may command its confidence, whatever may be his national character.

The only grounds, then, on which the right of restitution can be contended for in this case, arise out of the President's instructions of the 28th of August, 1812. On these, three points are made: 1st. That Johnson had, in fact, or ought from circumstances to be presumed to have had, notice of those instructions. 2d. If he had not at the time of the capture, yet, having received them before the arrival of the prize in port, he was bound then to have discharged her. 3d. That notice of the instructions was, in fact, unnecessary, as the instructions of the
p. 58 President had, | as to the conduct of privateers, all the operation of laws.

On the second and third of these points there exists but one opinion in this court. Although some doubt may be entertained relative to the form or nature of the notice necessary, yet we all agree that some notice is necessary, and that notice must precede the capture. Instruction, *ex vi termini*, is individual. Instruction to A., independent of legal privity or identification, is not instruction to B. Not so with laws: their power floats on the atmosphere we breathe. Necessity, or convention, or power, has given them a legal ubiquity coextensive with the legislative power of the government that enacts them. Notice here is altogether unnecessary, unless made so by the law itself. It is the *sic volo, sic jubeo*, of sovereign power, of which every individual subject to its jurisdiction is presumed to have notice, though time and distance stamp absurdity on the supposition. Unquestionably, the same operation might by law have been given to instructions emanating from the President; but this has not been done: on the contrary, the clause itself which vests the power in the executive, holds out the idea of the necessity of notice. That this notice must necessarily precede or accompany capture we are induced to infer from this consideration. By capture the individual acquires an inchoate statutory right, an interest which can only be defeated by the supreme legislative power of the Union. Condemnation does nothing more than ascertain that each individual case is within the Prize Act, and thus throws the individual
p. 59 upon his right acquired by | belligerant capture. Should the Prize Act, in the interim, be repealed, or its operation be suspended by the provisions of a treaty, there no longer exists a law to empower the courts to adjudge the prize to the individual captor. We can see nothing in the objects of the law authorizing the President to issue his instructions, nor in the instructions themselves, which can support the idea, that

that which was lawfully prize of war at the time of capture should cease to be so upon subsequent notice of the instructions. Both the act itself, and the instructions, in their plain and obvious sense, may well be construed so as to arrest the arm of hostility before it has given the blow. But not only is there nothing either in the act or instructions to which an ulterior operation can be given, but the policy of the country, as well as the fair claims of the prowess, perseverance, and expenses of the individual forbid our giving an effect either to the act or the instructions which will deprive the captor of the just fruits of his bravery and enterprise. The fact of notice, then, alone remains to be considered: and this must either be inferred from circumstances, or received upon the evidence of confession. On this point, computation of time becomes material. The capture was made, as we collect from the officers and crew, on the 3d of September; but as the nautical calculation of time commences at noon, this may mean on the morning of the 4th of September The additional instructions bear date the 28th of August, and were, probably, forwarded by the mail of the 29th. It cannot, therefore, be supposed that they were published in Philadelphia before the 31st | of p. 60
August, nor in New-York before the 2d; at any rate, not before the 1st of September. This certainly leaves time enough for the information to have been communicated from New-York, but renders it impossible, that it could have been received either from the Eagle or the pilot boat, as they were both spoken off Charleston, and the latter was seven days out; whereas the Tickler left St. Mary's, in Georgia, on the 24th. Whether such information was not in fact communicated off New-York, is a point on which the evidence would leave us little room for a contrariety of opinion, were it not for the loss of the logbook and journal. For this circumstance, taken in conjunction with the evidence of confession, some of the court are inclined to entertain an unfavourable idea of the captor's cause. But the majority are of opinion, that they cannot attach so much importance to it. The evidence of Paine, Ferris, and Warren, all officers of the privateer, and, at the time of testifying, devested of all interest in the capture, positively negatives the only fact from which notice could be implied, to wit, the speaking of any vessel beside the Eagle and the pilot boat, previous to the capture of the Mary and Susan. And this, we think, is supported by probability, when it is considered how very few vessels at that time could venture to leave our ports; that there is no probability the Tickler could have ventured to lie off and on the port of New-York any length of time; and that, from her leaving the port of St. Mary's to her arrival at New-York, there elapsed no more than the ordinary time of performing that voyage. In addition to which considerations, | we cannot but think, that a copy p. 61
of the journal of this voyage was, as it ought to have been, deposited in

the custom-house; and this circumstance, whilst it was calculated to make the captor less careful in preserving the original, enabled the claimant to avail himself of every advantage which could have been derived from the original. On the evidence of confession, we are not inclined to enter into the consideration of the depositions, intended on the one hand to support, and on the other to impugn, the credibility of Waldron and Garnsey. Nothing can be more painful than the necessity of entering upon such investigations; nothing more unsatisfactory than to found a legal decision as to the credibility of a witness upon oral testimony, unsupported by the *evidentia rei*. In this case we are induced to conclude that these witnesses misunderstood Johnson; that the knowledge of which the latter spoke, was that acquired subsequent to the capture; that it could not have related to any other knowledge we think incontestible, from the single consideration that the evidence in the case proves it to have been inconsistent with the fact. It was not possible, under the circumstances of the case, that such knowledge could have been communicated for want of the means of communication, and that it was not, is positively sworn to by three witnesses whose testimony stands wholly unimpeached.

Sentence of the circuit court affirmed with costs.

The Rugen.—Buhring, claimant.

(1 Wheaton, 62) 1816.

A question of proprietary interest, and of trading with the enemy.

Appeal from the circuit court for the district of Georgia. The Schooner Rugen and cargo were libelled in the district court for that district, as prize of war, either as belonging to the enemies of the United States, or as the property of citizens who had been trading with the enemy.

A claim was interposed by Mr. Buhring, a subject of the king of Sweden, on the ground that both vessel and cargo belonged to him, and were, *bona fide* neutral property. This claim was rejected by the district court; which sentence was affirmed by the circuit court, and thereupon the claimant appealed to this court.

Charlton, for the appellant and claimant, stated, that the ship was formerly British, had been captured, condemned as prize of war in the district court, and sold by the marshal to one Bixby, who sold to Buhring, the present claimant. 1. He cited the case of the Sisters[1] as to the proprietary interest, and argued, that the regularity of the papers is *prima facie* evidence of neutrality, and conclusive, unless rebutted by contra-
p. 63 dictory proof. The primitive | national character of the ship was changed

[1] 5 *Rob.* 141.

by condemnation, and the sale to a neutral was legal.[1] Testimony was irregularly admitted, which was neither taken *in preparatorio*, nor found on board, nor invoked from any other captured vessel. 2. The voyage was strictly within the range of neutral rights. If the neutral character of the ship and cargo was established, the destination was immaterial, whether to an enemy or neutral port. But the ship was, in fact, destined to a neutral port, and diverted from her course by the enemy's vessel La Decouverte. False papers may be used, if not to cover enemy's property, or evade belligerent rights;[2] and this court is not bound to take notice of, or enforce, the revenue laws of other countries. 3. The property ought to be restored with costs and damages, because the documentary evidence proclaimed the neutral character of the ship and cargo.

The *Attorney General* and *Pinkney*, for the respondents and captors, stated, that this was one of the plainest cases for condemnation that ever came into a court of prize, upon two grounds:

1st. That the real property was not in the claimant, but in a citizen of the United States.

2d. That it was taken trading with the enemy.

1. In the Odin,[3] where the papers were complete, and the *res gesta* similar to the transactions in this | case, confiscation was decreed. The p. 64
conduct and resources of the claimant were the same as those of Krefting, the Dane. According to the doctrine of Sir William Scott, exercising ownership by the same master is conclusive;[4] but here the former owner continued to exercise dominion over the thing pretended to be transferred in his own proper person. The ship also continued in her originally intended employment, which was another badge of fraud.[5] The cases cited were of a transfer by the enemy to a neutral, and the former master continued: but here the citizen wishing to trade with the enemy takes a foreign garb to deceive, not a foreign, but his own government. This case is to be arranged under that branch of public law which depends upon the municipal law of allegiance; and the presumption is more irresistible than in the other, where the property is taken and proceeded against as enemy's property. The *vis major*, by which it is alleged the ship was compelled to enter an enemy's port on the outward voyage, is not such as would be admitted as an excuse for deviation, even in a fiscal case, or in an action on a policy of insurance. The endorsement of the ship's papers by the enemy's vessel might have produced a certain effect; but in the view of the law of nations, a parol order could have no effect, tending to confiscation in a prize court, or even detention for trial. The

[1] 1 *Rob.* 104. The Welvaart.
[2] 1 *Rob.* 139. The Vrouw. 3 *Rob.* 147. The Flora and Commercium. 4 *Rob.* 166. The Convenientia. *Ib.* 87. The Caroline.
[3] 1 *Rob.* 208.
[4] 1 *Rob.* 217. The Odin.
[5] 6 *Rob.* 71. The Omnibus. 4 *Rob.* 26. The Jenny.

falsification and spoliation of papers, in this case, would alone be sufficient
p. 65 to justify condemnation.[1] | Spoliation of papers may be explained by the preparatory examinations so as to affect the question of *costs* only; but here, taken in connection with the simulated papers, the false destination, and the other circumstances of *mala fides*, it is conclusive. Much of the evidence in the case, according to the strict regularity of prize practice, is inadmissible; but the proceedings may be considered as equivalent to an order for farther proof. The case of the Sisters was before the court of admiralty as an Instance Court; an equitable title, conflicting with a legal, and there being no *constat* of property, the court, according to the notions which prevail in England, could not interfere. 2. Supposing the property to be in the claimant, it cannot be restored; he was a resident in the United States, and carried on a trade with the enemy, contrary to the obligations of his temporary allegiance.[2] And supposing the ship to have been compelled to enter the enemy's port by *vis major*, the purchase of a return cargo would import confiscation, being a voluntary act of trading with the enemy. Costs and damages
p. 66 ought to be | awarded to the captors, it being a fraudulent case, and the property delivered to the appellant upon bail.

Charleton, for the appellant and claimant, in reply. A national character is impressed by the flag and pass. If the property is neutral, the master had a right to clear out with a false destination, according to the authority of the Neptunus, since it is not usual to clear out from one hostile port to another. The simulated papers were not intended for the purpose, and could not have the effect, of defrauding this country of its rights as a power at war. The destruction of papers was accidental, and the circumstances of the case are not like those of the Odin.

February 20th.

LIVINGSTON, J., delivered the opinion of the court.

It has been contended, that this vessel and cargo were *bona fide* the property of the appellant, a subject of Sweden, who had a right to trade with the enemy of the United States; and that having done nothing to forfeit his neutral character, both the sentences below were erroneous, and ought to be reversed. To entitle himself to such reversal, the claimant has undertaken to show, and insists that he has shown, that

[1] 1 *Rob.* III. 131. The Two Brothers.

[2] A neutral subject domiciled in the belligerent state, is considered as a merchant of that country, so as to render his property taken in trade with the enemy liable to capture and confiscation, in the same manner as that of persons owing permanent allegiance to the state. 3 *Rob.* 26. The Indian Chief. The converse of the rule is also applied to subjects or citizens of the belligerent state resident in a neutral country, whose trade with the enemy is considered as lawful; except in contraband of war, which is deemed inconsistent with their permanent allegiance, and, it may be added, is equally prohibited to them in their character of neutral merchants. Vide 6 *Rob.* 408. The Neptunus.

at the time of, and previous to, the departure of the Rugen from the United States, she, as well as the cargo on board, was his property, and that he was then, and still is, a subject of the king of Sweden, with whom the United States were at peace.

The court will now proceed to inquire how far Mr. | Buhring has p. 67
succeeded in establishing the facts on which he relies for a restitution of this property. In pursuing this inquiry, it may become unnecessary to decide whether the papers which were on board were sufficient to entitle the Rugen to the privileges or national character of a Swedish vessel; because, whatever may be their regularity and effect, yet, if the court shall be of opinion that they were only colourable, and that an American citizen, and not the claimant, was owner of the vessel and cargo, it will not be pretended that belligerent rights can be eluded in this way; or that the subject of a state at war can, under cover of neutral muniments, however regularly procured, or formal they may be, violate, with impunity, his duty and allegiance to his own country. So far from such documents, when intended only as a cover, affording any protection to the property, they render the party resorting to them doubly criminal, by the scene of fraud and perjury which must be waded through in order to obtain them; and then, in case of disaster, to make a court believe that such papers disclose nothing but the real truth of the case. The whole controversy will then be resolved into the single question, whether, in point of fact, Mr. Buhring, or Messrs. Samuel and Charles Howard, who are citizens of the United States, were owners of the Rugen and her cargo at the time of her sailing from Savannah, and on her return to the United States. It must ever be a painful task to investigate testimony where a result unfavourable to the claimant can only proceed from a conviction that the principal agents in the transaction | have acted either fraudu- p. 68
lently, or contrary to their known duty as good citizens. Such is the duty now imposed on the court.

The claimant is said to be a Swede. If this be admitted, and it seems not to be denied, we are compelled, by the very suspicious circumstances of this case, to look beyond his national character, and to inquire very particularly into his situation at the time he embarked, or became connected with this adventure. Had he ever been a merchant in his own country, or elsewhere? Had he ever resided in any of our seaports, or carried on business of any kind there, or in any other place? Had he, at any time, means to purchase this vessel and cargo; or was he sufficiently known to have acquired a credit to that extent? These questions were all asked by the advocate of the captors, to which no satisfactory answer was given on the argument; and it is in vain that the proceedings are searched for a solution of either of them at all favourable to the present claim. On the contrary, easily as every difficulty on these points

might have been dispelled, if this were a fair proceeding, no attempt of the kind has been made, or if it has, it has terminated in establishing that Mr. Buhring's situation and circumstances were such as preclude all reasonable doubt of his being any other than the *ostensible* owner of the vessel and cargo. He was a young man only twenty-one years old, residing, as well as his brother William, in South Carolina, with Mr. Scarborough, Vice Commercial Agent of the king of Sweden, for the state of
p. 69 Georgia. From this retirement he is drawn, and, for the | first time, introduced to the notice of the mercantile world by the Messrs. Howards, who appear to be merchants of considerable property and credit, residing at Savannah, in the State of Georgia. Between these gentlemen and Mr. Buhring there could have been but very little previous acquaintance; for the latter arrived at Savannah from Europe only two or three months before we find him engaged in the concerns of the Rugen; and after remaining not more than three or four days in that city he went to reside in the country of South Carolina, whence he did not return to Savannah until he came back with Mr. C. Howard, a very few days before the Rugen sailed. It is not, then, harsh to presume, that the strongest and only recommendation of Mr. Buhring was his national character. The Messrs. Howards appear, at the time, to have been in search of a Swede, and were not long in meeting with one whose youth and inexperience well fitted him for the purposes for which, there is so much reason to believe, he was wanted. A feeble attempt, however, has been made to show that Mr. Buhring was not without credit as well as funds. To the former point one witness has been examined, and to establish that he was not entirely destitute of property, it has been shown that he actually gave two notes, amounting, together, to about 4,300 dollars, for the Rugen and her cargo, in the month of May, 1813, payable in four months after date; that these notes, as they became due, were taken up by him with great punctuality at one of the banks in Savannah. Whether these notes were really
p. 70 made at the time when they bear date, may | well be doubted; but it admits of no doubt that they were discharged with the proper moneys of the Messrs. Howards, which had almost the moment before been drawn, by one of them, out of the bank, and put into the hands of Mr. Buhring for that purpose. With the funds, then, of Mr. Howard, and not with those of Mr. Buhring, were these notes taken up; and a contrivance, which was intended to make Mr. Buhring appear as a man of property, has not only altogether failed, but has added very considerable weight to the suggestion of the captors, that he was a young man totally destitute of the means of purchasing and paying for the property which, it is now alleged, belonged to him. But we now find Mr. Buhring at Savannah; and what is done with him? or what does he do with himself, on his arrival there? Does he go about to purchase a vessel? Does he, when he

is told that the Rugen belongs to him, take any measures to fit her out? Does he provide a crew? Does he agree for their wages? Does he purchase a cargo? Does he see to its being put on board? Does he effect insurance? or is he found doing any one act which might naturally be expected from an owner? All this trouble had already been most kindly taken off his hands by his new friend and acquaintance, Mr. Howard. This gentleman had already (if we are to believe the history of this transaction as it is narrated by the claimant) provided him with a vessel and cargo, although it does not appear that he had instructions or funds of Mr. Buhring for the purpose. It is true, that with a caution that was very excusable, considering | the circumstances of Mr. Buhring, the bill p. 71
of sale which had been executed by the marshal, with a blank for the name of the vendee, was not put into the possession of Mr. Buhring, but carefully retained by the Messrs. Howards, they executing to him one in their own names, although they now say they never were the owners of the vessel. And even this bill of sale, it is very probable, remained in the custody of Mr. Samuel Howard during the whole of the voyage to Jamaica and back to the United States. Everything being now in readiness for their departure from Savannah, Mr. Buhring appears on board, and is introduced to the mate and crew, not merely as owner of vessel and cargo, but as master for the voyage. Whether any surprise were excited on board by the new character in which the claimant appeared, or whether they expressed any reluctance at placing themselves under his command, we know not; nor is it a fact very necessary to ascertain, because they must soon have discovered that Mr. Samuel Howard, whose friendship for Mr. Buhring seems to have had no limit, and in whose seamanship they may have had full confidence, intended to go with the vessel, and relieve Mr. Buhring from the troublesome task, if he were equal to it, of navigating the Rugen. For this conduct, on the part of Mr. Howard, no other reasonable motive can be assigned than an interest in the vessel and cargo. The allegation of his going after certain funds in Carthagena is not at all made out. The Rugen leaves Savannah on the 5th or 6th of May, bound, as is alleged, for Carthagena, but arrives at Kingston, in | the island of Jamaica. The court is not at all satisfied p. 72
with the excuses which have been made for her going there. It does not appear that a *vis major* of any kind existed. She was neither forced in by adverse winds, nor was she under any restraint from capture. When within only four leagues of the island she was boarded by a British brig of war called La Decouverte, whose commander ordered her into Kingston. He put no prize-master on board; nor did he endorse any of her papers; nor did he keep company with her: and yet we find her doing exactly what she was verbally directed to do. It is faintly pretended, that if she had attempted, after that, to go to Carthagena, she could not have

escaped the British cruisers which swarmed about the island. But what greater danger, if the property were neutral, would ensue on a capture by any other British vessel than by her going to a British port as prize to the Decouverte, or by her orders? It is believed, then, that her going to Jamaica was voluntary, and formed part of the original plan; which opinion derives considerable support from the fact of insurance having been made, not only for *Carthagena*, but also for a port *in the West Indies*; from the nature of the outward cargo; from the readiness with which they consented to dispose of it at that place, and procured another for this country promising a much greater profit than any which at that time could have been imported from Carthagena. There is yet a still stronger circumstance to prove that the destination of the Rugen to Carthagena was fictitious; and that is, her meeting at Kingston a ship called the
p. 73 *Wanschop*, | which had sailed from Savannah but a little before the Rugen. On board of that vessel we find Mr. *William Buhring*, a brother of the claimant, and we have every reason to believe that she belonged, with her cargo, to the same concern. The Wanschop, it is also said, was destined for Porto Bello, on the Spanish Main; but by a strange coincidence of events, which can scarcely have been the effect of chance alone, she also gets out of her course, falls in with the same British vessel of war which afterwards boarded the Rugen; receives the like order to proceed to Kingston, which she also very promptly, and without any apparent reluctance, complied with. The business of these two vessels is managed by the same house in Kingston, and the proceeds of both of their cargoes are invested in molasses, rum, &c., which composed the return cargo of the Rugen. If the property claimed were *bona fide* Swedish, it would be superfluous to inquire whether the Rugen's going to Jamaica were voluntary, or by coercion, a subject of Sweden having, for aught that appears, as good right to trade there as at Carthagena. But if it belonged to the American gentlemen, who have had an agency so conspicuous in the whole of this business, (and that it did is our unanimous opinion,) it will not be pretended that they could go to Kingston unless by compulsion, or that they had any right during the late war to purchase and bring a cargo from any British port to this or any other country.

The court having already expressed its opinion, that this vessel and
p. 74 cargo did not belong to the | claimant, but to citizens of the United States, the latter having been purchased at Kingston, as is believed, with their funds; it becomes quite unnecessary to inquire what was the real destination of the Rugen on her leaving Kingston; whether she were bound, in fact, to Amelia Island, or to the United States; although it might not be very difficult to come to a satisfactory conclusion that Hardwicke, in Georgia, was her real port of destination. But this examination is unnecessary; for the owners, being American citizens, are equally

guilty of trading with the enemy, whether that trade were carried on between a British port and the United States, or between such port and any foreign nation; and in the present case, if the court be correct in the view which it has taken of the evidence, the offence of trading with the enemy was complete the moment the Rugen sailed from Savannah with an intention to carry her cargo to Kingston, in Jamaica. Upon the whole, without taking notice of many of the arguments urged by the advocates of the captors in favour of condemnation, and which are entitled to great consideration, the court is unanimously of opinion, that the decree of the circourt court, rejecting the claim of Mr. Buhring, was correct, and must, in all things, be affirmed.

Sentence affirmed with costs.

The Venus.—Jademerowsky, claimant.

(1 Wheaton, 112) 1816.

A case of further proof.

APPEAL from the decree of the circuit court for the district of Georgia. This ship having taken in a cargo at London, proceeded to Portsmouth, and from thence, on the 12th of April, 1814, sailed for St. Bartholomews, under convoy of a British ship of war. From St. Bartholomews she sailed for the Havannah, but on her passage thither was captured and sent into the island of St. Thomas, for adjudication, by a British cruiser. Upon being released from this detention, she abandoned her destination for the Havannah, and was proceeding to Amelia Island, when she was captured by the flotilla under the command of commodore Campbell, and sent into the port of Savannah, where the vessel and cargo were libelled as prize. The ship was restored by consent, in the court below, as Russian property; the cargo was condemned as prize of war, and an appeal entered from that sentence by the claimant. The proofs of property consisted, 1. Of a recital in a power of attorney, from one Jones, the alleged agent, in London, of the claimant, (who was stated to be a Russian merchant domiciled at St. Petersburgh,) to Mr. Diamond, the supercargo. 2. A certificate of property from the Russian Consul General in | London. 3. The testimony of Mr. Diamond, and other p. 113
witnesses, taken *in preparatorio*, expressing their belief that the property was as claimed.

Charleton, for the appellant and claimant, offered to read affidavits in the nature of farther proof.

STORY, J. Until the cause is heard, farther proof cannot be admitted.

MARSHALL, CH. J. If, upon the opening, it appears to be a case for farther proof, then it may be admitted *instanter*, unless, indeed, the

court should be of the opinion that the captors ought to be allowed to produce farther proof also. The cause is before us as if in the inferior court.

Charleton. We contend that it is a case entitled to farther proof, and that there is no circumstance of fraud or *mala fides* to preclude it.

The *Attorney General*, contra. It is incumbent upon the claimant to make out his title by competent testimony, according to the rules of the prize court; and if the court should be of opinion, that the property does not belong as claimed, the captors will be entitled to condemnation, without specifically proving to whom it does belong.[1] The recital in the power from Jones to Diamond, cannot be sufficient to show the interest
p. 114 of Mr. Jademerowsky. | The recital in a deed binds only the parties, and those claiming under it: we are entitled to the production of the original power, duly authenticated.[2] The certificate of the Russian consul general is no proof of the real property.[3] The failure on the part of the supercargo to testify, positively, as to the property, is, in the prize court, always held strongly against the title of the claimant.[4] The cargo was purchased and loaded in a British port, and the ship had an alternative destination to a British colony. The voyage is different from that authorized in the original power from Mr. Jademerowsky to Jones; and, therefore, such power either never existed, or it is falsified by the evidence, and must be repudiated by the court.

Pinkney, in reply, agreed that, in a suspicious case, restitution could not be demanded upon the original evidence; but, this is a case of farther proof, and there is no evidence of fraud, or unneutral conduct, to preclude it. The documentary evidence expresses neutral account and risk. By the law of nations, the papers must be supported by the examinations *in preparatorio*; but, there is no determination which warrants the position, that the supercargo must swear to anything more than *belief*. He is, in this respect, in the same predicament with the master. In both cases, it is matter, not of positive knowledge, but of inference from
p. 115 the circumstances which | come to his knowledge. The consular certificate is a part of the ship's papers, and, as such, is necessarily a part of the documentary evidence in the cause. The recital of the procuration is said not to be admissible at common law; but, this court is now sitting as a court of prize.

March 2d.

The cause was this day ordered to farther proof, on the part of the captors and claimants.

Farther proof ordered.

[1] 1 *Rob.* 227. The Odin. 3 *Rob.* 68. The Neptunus
[2] 1 *Rob.* 133. The Argo.
[3] 1 *Rob.* 19. The Endraught.
[4] 1 *Rob.* 68. The Neptunus.

The Astrea.

(1 Wheaton, 125) 1816.

An enemy's vessel was captured by a privateer, recaptured by another enemy's vessel, and again recaptured by another privateer, and brought in for adjudication. It was held that the prize vested in the last captor. An interest acquired in war, by possession, is devested by the loss of possession.

APPEAL from the circuit court for the district of Georgia. This was an enemy's vessel, captured by the privateer *Ultor*, in sight of Surinam, on the 17th of May, 1813; and on the 13th of June, 1813, recaptured by an enemy's vessel of war, about two leagues from the coast of Georgia, and, on the same day, recaptured by the privateer *Midas*, and brought into the port of Savannah, for adjudication. The prize was adjudged to the last captors, by the decree of the court below, from which the first captors appealed to this court.

Charleton, for the appellants, contended, that the prize interest vested in the first captors. He argued, that the opinions of eminent civilians, and the practice of the continental nations of Europe, ought to prevail, rather than the decisions of the British courts of prize; which last are founded on reasons of commercial and naval policy, peculiar to England. Sir William Scott himself admitted, that there is no | general rule,[1] but p. 126
adopted the rule of condemnation, as most convenient for his own country; because, by protracting the period for the devesture of British interests, it places the property of British subjects upon a better and more secure footing than the rule adopted by any other nation. It gives a wider range to the *jus postliminii*, and enlarges the probability of recapture; a probability, which is converted almost into a certainty, by the maritime strength of Great Britain. Other nations, not having the same means of giving protection and security to captures, have adopted rules requiring a less firm and shorter possession, in order to devest the property. These rules are, 1st. That of immediate possession. 2d. That of pernoctation and twenty-four hours possession. 3d. The bringing *infra præsidia*.[2] The first is held sufficient by *Azuni*;[3] and though his own opinion is entitled to but little weight, it deserves consideration how far he is supported by authorities. It is the maxim of the civil law, that things taken from the enemy immediately become the property of the captors. *Quæ ex hostibus capientur* STATIM *capientium fiunt.* Grotius and Vattel are guilty of great inconsistencies in expounding the rule in question. Burlamaqui is clear and explicit, that mere possession immediately vests a title.[4] Bynkershoek does not require a sentence of condemnation; | and he p. 127

[1] 1 *Rob.* 50. The Santa Cruz.
[2] *Wheaton on Captures*, c. 8. s. 14, 15. 17, 18.
[3] 2 *Azuni*, 236.
[4] *Burlam. Nat. and Pol. Law*, 222.

enumerates 'fleets' among the *præsidia*, under the protection of which the thing taken may be considered as safe;[1] so that a bringing into the territorial limits is not indispensable, because the fleet into which the captor brings his prize may be remote from the coasts of his country. It results, then, that the loss of the *spes recuperandi* is the true foundation of the rule established by jurists: it is this which consummates the title of the captors, and destroys the *jus postliminii* of the law of nations; it is the municipal code of England alone which requires a sentence of condemnation to perfect the title. 2. But, supposing the *jus postliminii* still to continue, it is a right to be asserted by the subjects of the state from whom the property has been captured. But is it competent for one citizen of the belligerant state to devest another of the incipient inchoate title he had acquired by the first capture? The recapture by the enemy might, indeed, enable the original owner to reclaim his property; if a sentence of condemnation be necessary, it might affect the title of a neutral purchaser; but the *jus postliminii* can have no operation as between the first and second captors.

Harper, contra, was stopped by the court.

March 4th.

MARSHALL, Ch. J. An interest acquired by possession, is devested by the loss of possession from the very nature of a title acquired in war.
p. 128 The law of | our own country, as to salvage, settles the question, and the case of the Adventure[2] is directly in point and conclusive.

Sentence of the circuit court affirmed.

[1] *Bynk. Q. J. Pub.* c. 3. p. 29. of Du Ponceau's Translation.

[2] February Term, 1814.—This was the case of a British ship captured by two French frigates, and, after a part of the cargo was taken out, presented to the libellants in the cause, citizens of the United States, (then neutral,) whose vessel the frigates had before taken and burnt; by whom she was navigated into a port of this country, and, pending the suit instituted by them, war was declared between the United States and Great Britain. A question arose, whether this was a case of salvage? Mr. J. JOHNSON, by whom the opinion of the court was delivered, stated, that 'the fact of the gift was established by a writing under the hand of the commander of the squadron of frigates, in these words, *Je donne au capitaine*, &c., in the language of an unqualified donation, *inter vivos*. In this case, the most natural mode of acquiring a definite idea of the rights of the parties in the subject matter, will be, to follow it through the successive changes of circumstances, by which the nature and extent of those rights were affected:—the capture, the donation, the arrival in the neutral country, and the subsequent state of war. As between belligerants, capture undoubtedly produces a complete devesture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations has subjected all such captures to the scrutiny of judicial tribunals, as the only practical means of furnishing documentary evidence to accompany vessels that have been captured, for the purpose of proving, that the seizure was the act of sovereign authority, and not of mere individual outrage. In the case of a purchase made by a neutral, Great Britain demands the production of such documentary evidence, issuing from a court of competent authority, or will dispossess the purchaser of a ship originally British. 1 *Rob.* 135. The Flad Oyen. Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. He could

The Antonia Johanna.

(1 Wheaton, 159) 1816.

A neutral ship was chartered for a voyage from London to St. Michaels, thence to Fayal, thence to St. Petersburg or any port in the Baltic, and back to London, at the freight of 1,000 guineas. On her passage to St. Michaels, she was captured and brought into the port of Wilmington, N. C. for adjudication. A part of the cargo was condemned, and part restored.

The freight was held to be chargeable upon the whole cargo, as well upon that part restored as upon that condemned.

Query, Whether more than a *pro rata* freight was due to the master?

It seems that the property of a house of trade in the enemy's country is confiscable as prize of war, notwithstanding the neutral domicil of one or more of its partners.

APPEAL from the circuit court for the district of North Carolina. This was the case of a Russian ship, captured on the 2d of June, 1814,

be in no better situation than a prize master, navigating the prize in pursuance of orders from his commander. | The vessel remained liable to British recapture p. 129
on the whole voyage: and on her arrival in a neutral territory, the donee sunk into a mere bailee for the British claimant, with those rights over the thing in possession which the municipal law (civil and common) gives for care and labour bestowed upon it. The question then recurs, is this a case of salvage? On the negative of the proposition it was contended, that it is a case of forfeiture under the municipal law, and, therefore, not a case of salvage as against the United States; that it was an unneutral act to assist the French belligerant in bringing the vessel *infra præsidia*, or into any situation where the rights of capture would cease; and, therefore, not a case of salvage as against the British claimant. But, the court entertains an opinion unfavourable to both those objections. This could not have been a case within the view of the legislature when passing the non-importation act of March, 1809. The ship was the plank on which the shipwrecked mariners reached the shore; but to have cast into the sea the cargo, the property of a belligerant, would have been to do him an injury, by taking away the chance of recovery, subject to which they took it into their possession. Besides, bringing it into the United States does not necessarily presuppose a violation of the non-importation laws. If it came within the description of property cast casually on our shores, as the court is of opinion it did, legal provision existed for disposing of it, in such a manner as would comport with the policy of those laws. At last, they could but deliver it up to the hands of the government, to be re-shipped by the British claimants, or otherwise appropriated under the sanction of judicial process. And such was the course that they pursued. Far from attempting any violation of the laws of the country, upon their arrival they delivered it up to the custody of the laws, and left it to be disposed of under judicial authority. The case has no feature of illegal importation, and cannot possibly have imputed to it the violation of municipal law. As to the question arising on the interest of the British claimants, it will, at this time, (war having supervened,) be a sufficient answer, that they who have no rights in this court cannot urge a violation of their rights against the libellants. But there is still a much more satisfactory answer. To have attempted to carry the vessel *infra præsidia* of the enemy, would, unless it could have been excused on the ground of necessity, have been an unneutral act. But where every exertion is made to bring it into a place of safety, in which the original right of the captured would be revived, and might be asserted, instead of aiding his enemy, it is doing an act exclusively resulting to the benefit of the British claimant.' A salvage of one half was allowed by the court, and as to the residue, it was determined that it must stand on the same footing with other property found within the territory at the declaration of war, and might be claimed upon the termination of war, unless previously confiscated by the sovereign power. The court, therefore, made such order respecting it as would preserve it, subject to the will of the court, to be disposed of as future circumstances might render proper.

by the privateer Herald, on a voyage from London to St. Michaels, and brought into the port of Wilmington, N. C., for adjudication. The ship was chartered by Messrs. Burnet & Co., a mercantile firm at London, for a voyage from London to St. Michaels, thence to Fayal, thence to St. Petersburg or any port in the Baltic, and thence to return to London, at the stipulated freight of one thousand guineas. The ship and cargo were libelled as prize of war, and, upon the hearing in the district court, that part of the cargo which was not claimed was condemned. The
p. 160 residue of the cargo, excepting one moiety of certain | packages, claimed on behalf of Messrs. Ivens & Burnett, a mercantile firm at St. Michaels, was restored. The whole freight was decreed to be paid to the master, and charged exclusively upon the proceeds of the property condemned, and the moiety of the property restored to Messrs. Ivens & Burnett. From so much of this decree as respected the controversy between the captors and the claimants of the cargo, an appeal was interposed to the circuit court, where the decree was affirmed, and the cause was brought, by appeal from the latter decree, to this court.

Wheaton, for the appellants and captors. The cause may be divided into three branches:

1st. As to the claim for the three invoices of goods shipped by Messrs. Burnett & Co. of London, to Messrs. Ivens & Burnett, of St. Michaels.

2d. As to the remainder of the cargo.

3d. As to the order respecting the freight.

1. There is a hostile trade which will affect the property engaged in it with confiscation, as completely and effectually as a hostile *domicil*, and that without regard to the national character of the individual. Thus, the produce of an estate in the enemy's country, belonging to a person domiciled in a neutral country, is liable to capture and condemnation.[1] This principle was adopted and confirmed by this court, in the case of Mr. Bentzen, a Danish subject, resident in Denmark, whose
p. 161 claim to 30 hogsheads | of sugar, the produce of an estate belonging to him, in a West India island possessed by the enemy, was rejected, and the property condemned.[2] So a vessel purchased *bona fide* in the enemy's country, by a neutral, continuing in her former trade, is good prize.[3] And the property of a house of trade established in the enemy's country, though some of the parties may be domiciled in a neutral country, is prize of war.[4] Apply these authorities to the present case: the share of Mr. Ivens cannot escape the same fate with that of his partner domi-

[1] 5 *Rob.* 20. The Phœnix.
[2] Feb. T. 1815.
[3] 1 *Rob.* 1. The Vigilantia. 4 *Rob.* 31. The Jemmy. 3 *Rob.* 41. The Jonge Amelia, cited in the case of the Portland.
[4] 1 *Rob.* 1. The case of Mr. Coopman, cited in the Vigilantia. 2 *Rob.* 251. The Susa. 3 *Rob.* 41. The Portland. 5 *Rob.* 302. The Jonge Klassina.

ciled in London; the partnership is domiciled there, and his interest is so mixed up with hostile interests, that it cannot be separated. These principles were recognised by a learned judge of this court, in the first circuit, in the case of the St. Jose Indiano,[1] the decree in which was acquiesced in by the counsel. Their general spirit was adopted by that venerable tribunal, the continental court of appeals in prize causes, and applied even to a treaty stipulation, that *free ships should make free goods*, which was held not to extend to a trade carried on by a *neutral*, but hostile in its nature.[2] 2. As to the other portions of the cargo, the evidence to restore or condemn must come, in the first instance, from the documentary evidence and | the examinations *in preparatorio*. In this case, *that* is neither p. 162
sufficient for condemnation, nor does it afford satisfactory grounds for immediate restitution; farther proof ought, therefore, to be ordered. 3. The neutral master is undoubtedly entitled to his freight; but this is not to be charged, exclusively, upon the property condemned and ordered to be sold, whilst the property specifically restored escapes the burden which is imposed, solely upon the ground of an implied performance of the contract on the part of the master. The law says, that *capture* is equivalent to *delivery;* it does not say, that *condemnation* only, is equivalent to *delivery*, and that, therefore, the portion of the cargo restored, shall be charged with no part of the freight. On the contrary, in a case where the cargo has been unlivered, and the *whole* was restored upon the original evidence, the freight was held to be a charge upon the cargo, though it was not carried to the port of destination.[3] But, here, a *pro rata* freight only, ought to be allowed: but a small part of the whole voyage, for which the 1,000 guineas was stipulated to be paid, was to be performed in the service of *this* cargo, which was to be delivered at St. Michaels. The master was not bound to wait longer than the first adjudication; indeed, the unlivery completely dissolved the contract between him and the owners of the goods, and entitled the master to whatever freight he might have earned in their service.[4] |

Gaston, contra. 1. The captors cannot now object that the freight, p. 163
decreed in the court below to be paid to the master, was unreasonable in itself, or not chargeable to them. They have acquiesced in this part of the decree, and it has been definitively carried into execution. 2. The goods shipped to Messrs. Ivens & Burnett of St. Michaels, were shipped by order, and on account and risk of that house of trade. The claim, the documentary proof, and the preparatory examinations, are perfectly consistent, and establish that a moiety of this shipment is the property

[1] Claim of Messrs. Dyson, Brothers, & Fennie.
[2] 2 *Dall.* 34. Darby et al. v. the brig Estern.
[3] 3 *Rob.* 101. The Race Horse. See also the Martha and the Hamilton, in a note to the same case.
[4] 6 *Rob.* 231. The Hoffnung. 1 *Edwards*, 246. The Friends. 1 *Rob.* 289. The Copenhagen. 4 *Rob.* 77. The Isabella Jacobina.

of that house, the partners of which are domiciled in a neutral country; they must, therefore, be regarded as neutral by both belligerants, with reference to the trade which they carry on with the adverse belligerant, and with all the world. In the case of the St. Indiano, it was insisted that the principle of condemnation applied in cases where a partner of a neutral house is domiciled in the enemy's country, and ships to such house, goods, the manufacture of that country; but the position was expressly overruled. Even if the hostile and the neutral house here consisted of the same partners, and the shipment was made from the hostile to the neutral partner, for their joint concern, it would, nevertheless, be contended, that the share of the hostile partner was alone subject to condemnation. However sincere and profound a respect is felt for the learned judges, who are said to have decided that the belligerant character of one partner shall avail to condemn, and the neutral
p. 164 character of the other shall not avail to save, where the house has a | domicil both in the neutral and belligerant country; these supposed decisions cannot be reconciled with the dictates of justice, or the principles of reason, and it is, therefore, believed that they will not receive the sanction of the highest judicial tribunal of this country. 3. No specific ground has been taken by the captor's counsel, to support the appeal as to the remaining portions of the cargo. The claims are verified by the documentary evidence showing the goods to have been shipped by order, and for the account and risk of persons, subjects of, or domiciled in, a neutral country.

Wheaton, in reply. 1. If the captors have improvidently closed the door, in the court below, upon the question, as to what amount of freight shall be paid to the master, it is still open as to whether any portion of the cargo is to be exempt from contributing to the payment of freight. That is, emphatically, a controversy between the captors and claimants: the master has nothing to do with it; he has been paid his freight, and gone away. The bringing in the vessel and cargo for adjudication, was not a wrong done by the captors to the claimants, who may ultimately prove to be neutral; it was an inconvenience to which the latter subjected themselves by lading their goods in the same vessel with enemy's property; and it is not for the captors to indemnify them by paying the freight of the neutral claimants' goods, as well as those which have become the property of the captors *jure belli*. 2. According to the claimant's counsel,
p. 165 the shipments by Messrs. Burnett & Co. were | made by the hostile house, as the agents, and *bona fide* exclusively on the account and risk of the neutral house. On no other ground whatever can this case be extracted from the principle of the St. Indiano; and, upon that ground, the *whole* of the property ought to be restored, according to the limitations of the principle stated by the learned judge in the case of the St. Indiano. It is the domicil of the house, and the nature of its trade, and not the

belligerant character of one of the partners, that avails to condemn: And it is a doctrine that may be vindicated upon every principle of reason and justice. Upon what principle is the property of a neutral subject, personally domiciliated in the enemy's country, liable to condemnation? Not upon the ground that his original national character is lost, but that his property is undistinguishably incorporated with that of the enemy, and employed exclusively in carrying on his trade, and strengthening his resources. Is not the property of a house of trade, established in the enemy's country, wheresoever the partners may reside, in the same predicament? It is believed that the decisions cited to support these principles, will be sanctioned by this tribunal; that they are corollaries from the rules of prize law which have already been sanctioned by it; that they are supported by all the analogies of that law, and are essential to its perfection as a system of jurisprudence impartially administered between belligerants and neutrals. The interest which a power at war has in maintaining the principles of these decisions, is obvious. What interest has a fair and just neutral | in contesting it? His subjects may p. 166
carry on their usual trade through its accustomed channels, untouched by the flames of war spreading on every side. Do they wish to export their commodities to the enemy's country? They may consign them to commission merchants there, or to their own supercargoes on board. Do they wish to import the productions of the enemy's country into their own? They may purchase them by the same instrumentality. Do they wish to become the carriers of both to every region of the globe? They may do it with impunity. A neutral merchant cannot, therefore, wish to be a partner in a house of trade in the enemy's country, unless for the purpose of lending his national character as a shield against the just rights of the other belligerant. It is by a more remote application of the same principle now contended for, that the property of persons taken in breach of blockade, as contraband of war, or sailing under an enemy's license, is liable to be considered as enemy's property, *pro hac vice*. It is taken adhering to the enemy, clothed with his character, and inseparably blended with his interests. This rule is precisely settled by the positive adjudications of the British prize courts, and there is reason to believe is practised in those of France and other countries. It is not one of those interpolations into the code of public law, of which that great civilian, by whom it is expounded, has been accused. This is not like the rule which prohibits to neutrals, in time of war, all trade not open in peace; nor like the rule which declares whole coasts and countries in a state of blockade, | without investing or besieging a single port; nor like that p. 167
which extends the infection of contraband to a return voyage; nor that which swells the list of contraband, with every article however remotely useful in war. Nor is it a rule of recent invention; at least, there is no

evidence that the cases mentioned in the Vigilantia were decided contrary to the practice and opinions maintained by the British courts of prize, when this country was a portion of the British empire. 3. The remaining claims are said to be verified by the papers found on board. But how are these papers verified? It is well known that papers are a mere dead letter, unless supported by the testimony of living witnesses. When it is considered that the cargo was laden in the enemy's country, and the papers put on board by enemy shippers, only one of whom the master knows any thing about, so as to be able to swear, even as to his belief, it is not too much to say, that this part of the case requires farther proof to justify restitution of the goods as claimed.

March 8th.

STORY, J., delivered the opinion of the court, and, after stating the facts, proceeded as follows:

Upon the argument no specific objection was taken to the restitution of any of the property claimed, excepting that included in the claim of Messrs. Ivens & Burnett. This shipment was made by Messrs. Burnett & Co. of London, to Messrs. Ivens & Burnett of St. Michaels, and the invoices declare the goods to be by order, and for account and risk, of the
p. 168 latter gentlemen. It is contended, in behalf of the | captors, that both houses are composed of the same persons, viz. William S. Burnett, who is domiciled at London, and William Ivens, who is domiciled at St. Michaels; and that the documentary evidence, and private correspondence, show that the shipment was made on account of the hostile house. If the fact of the identity of the two houses were material to a decision of the cause, it might furnish a proper ground for an order for farther proof. But admitting the fact to be as the captors contend, we are satisfied that it can be of no avail to them. It is clear, from the whole documentary evidence, that this shipment was not made on the account and risk of the hostile house, but *bona fide* on the account and risk of the neutral house. It does not, therefore, present a case for the application of the principle, that the property of a house of trade in the enemy's country is condemnable as prize, notwithstanding the neutral domicil of one of its partners. On the contrary, it presents a case for the application of the ordinary principle which subjects to confiscation, *jure belli*, the share of a partner in a neutral house, where his own domicil is in a hostile country. And, on this view, the decision of the circuit court is entirely correct, and is consistent with the doctrines established in the cases cited at the argument.

The next inquiry is, as to the freight decreed to the master. As no appeal was interposed to the decree of the district court, allowing the whole freight for the whole voyage, the question, whether more than

a *pro rata* freight was due, (a question which would otherwise have deserved grave consideration,) | does not properly arise. The only discussion p. 169
which can now be entertained, is, whether the freight so decreed ought not to have been charged upon the whole cargo, instead of being charged upon a portion of it. And we are all of opinion that it was properly a charge upon the whole cargo. Although capture be deemed, in the prize courts, in many cases, equivalent to delivery, yet the captors cannot be liable for more than the freight of the goods actually received by them. The capture of a neutral ship, having enemy's property on board, is a strictly justifiable exercise of the rights of war. It is no wrong done to the neutral, even though the voyage be thereby defeated. The captors are not, therefore, answerable *in pœnam* to the neutral for the losses which he may sustain by a lawful exercise of belligerant rights. It is the misfortune of the neutral, and not the fault of the belligerant. By the capture, the captors are substituted in lieu of the original owners, and they take the property *cum onere*. They are, therefore, responsible for the freight which then attached upon the property, of which the sentence of condemnation ascertains them to be the rightful owners succeeding to the former proprietors. So far the rule seems perfectly equitable; but to press it farther, and charge them with the freight of goods which they have never received, or with the burden of a charter party into which they have never entered, would be unreasonable in itself, and inconsistent with the admitted principles of prize law. It might, in a case of justifiable capture, by the condemnation of a single bale of goods, | lead the captors p. 170
to their ruin with the stipulated freight of a whole cargo.

On the whole, we are all of opinion, that the decree of the circuit court ought to be affirmed, except so far as it charges the freight upon the property condemned, and the moiety claimed by Messrs. Ivens & Burnett; and as to this, it ought to be reversed, and that the freight should be decreed to be a charge upon the whole cargo, to be paid by each parcel thereof, in proportion to its value.

Decree affirmed, except as to the freight.[1]

[1] It has been held, that the charter party is not the measure by which the captor is, in all cases, bound, even where no fraud is imputed to the contract itself. When, by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not, necessarily, bound to that inflamed rate of freight. When no such circumstances exist, when a ship is carrying on an ordinary trade, the charter party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo, and takes with that specific lien upon it. But a very different rule is to be applied, when the trade is subjected to very extraordinary risk and hazard, from its connexion with the events of war, and the redoubled activity and success of the belligerant cruisers. 5 *Rob.* 82. The Twilling Riget.

The Nereid.—Pinto, claimant.

(1 Wheaton, 171) 1816.

Under the Prize Act of June 26th, 1812, and the act of the 2d of August, 1813, allowing a deduction of thirty-three and one third per centum on 'all goods captured from the enemy, and made good and lawful prize of war, &c., and brought into the United States,' are not included goods captured and brought in for adjudication, sold by order of court, and ultimately restored to a neutral claimant as his property; but such goods are chargeable with the same rate of duties as goods imported in foreign bottoms.

THIS cause was originally brought into the circuit court, by appeal from the district court for the southern district of New-York, in which the property, claimed by Mr. Pinto, had been condemned as prize of war. The decree of the district court was affirmed in the circuit court, September term, 1814, *pro forma*, for the purpose of taking the cause, by appeal, before the supreme court, for its final determination; which was accordingly done, and the decree of the circuit court reversed, February term, 1815, except as to the undivided fourth part which Mr. Pinto claimed of certain goods, part of the cargo, his claim to which was relinquished by his counsel, on the argument of the cause before the supreme court. All the other property claimed by Mr. Pinto, for himself and others, was ordered to be restored to him. The cause was then remanded to the circuit
p. 172 court, with directions to carry the decree | of the supreme court into effect; and the mandate for that purpose was filed in the circuit court, April term, 1815, and an order made in pursuance of the mandate.

It was then stated, and made to appear to the satisfaction of the circuit court, that, after the Nereid and her cargo had been libelled by the captors, as prize of war, in the district court, and after the condemnation thereof, except the parts of the cargo which were claimed by Mr. Pinto, and during the pendency of such claim, Peter H. Schenck, the prize agent of the Governor Tompkins, entered the whole of the cargo of the Nereid at the custom house of the city of New-York, and secured the duties thereon; Mr. Pinto having consented that the goods which he claimed should be entered with the others, and be subject to the payment of such duties as they were by law liable to, without prejudice to his rights under his claim; that the prize agent did enter the goods, so condemned, (as also the said goods of which Mr. Pinto claimed the one fourth,) as prize goods, and bonded therefor for prize duties; but was required by the collector of the customs, and did enter all the residue of the goods, claimed by Mr. Pinto, as neutral property, subject to the full duties payable on goods regularly imported in foreign bottoms, and bonded for the same accordingly. The goods claimed by Mr. Pinto were afterwards, and before condemnation, sold by the marshal of the district, together with the goods condemned, in pursuance of an order of the

district court, to which Mr. Pinto also consented, subject to the same reservation of his rights; and the proceeds | of the sales of the goods p. 173
claimed by Mr. Pinto, after deducting the duties, were paid into court; the amount of the said duties having been paid by the marshal to the prize agent, with the consent of Mr. Pinto, for the prize agent's indemnity. The difference between the duties thus secured to be paid by the prize agent on the goods finally restored to Mr. Pinto, according to the decision of the supreme court, and those which would have been payable on them, as prize goods, under the act of the 2d of August, 1813, entitled, 'An act for reducing the duties payable on prize goods captured by the private armed vessels of the United States,' amounted to 11,079 dollars and 59 cents. After the mandate and decree of the supreme court, respecting the restitution of the goods claimed by Mr. Pinto, was carried into effect by the circuit court, there remained in the district court the sum of 18,771 dollars and 63 cents, being the amount of the net proceeds of the fourth part of the goods, Mr. Pinto's claim to which had been relinquished.

A motion was made in the circuit court on behalf of Mr. Pinto, that the prize agent should be ordered to pay to him, out of any of the proceeds of the sales of the condemned part of the Nereid and cargo, and which were in, or might come to, his hands, the said sum of 11,079 dollars and 59 cents, the difference between the two rates of duties on the goods finally restored to Mr. Pinto, as before mentioned.

It then appeared to this court that three bonds had been given, by the prize agent, for the duties on those goods which were thus ordered to be restored | to Mr. Pinto; that the two of those bonds which first p. 174
became due had been paid by the prize agent; but that the last, which became payable on the 9th of February, 1815, and which was for the sum of 8,782 dollars and 97 cents, the collector had suffered, as he said, to remain unpaid until it should be ascertained whether the property, on which said duties were thus secured, was condemned to the captors, or restored to the claimant. That after the mandate of the supreme court was returned to the circuit court, the collector required the prize agent to pay this bond, and he paid the same accordingly on the 7th of April, 1815.

The court were divided in opinion on the point respecting the rates of duties chargeable on the goods so restored to Mr. Pinto; whereupon it was ordered that the said sum of 11,079 dollars and 59 cents shall remain subject to the opinion of the supreme court, and that the residue of the 18,771 dollars and 65 cents be paid to Mr. Schenck, as the prize agent. And that the point on which the disagreement of the judges of the circuit court took place should be certified to the supreme court for their final decision thereon.

Hoffman, for the appellant and claimant. The statutes on this subject are, 1st. The Prize Act of the 26th of June, 1812, s. 14, which repeals

the Non-Importation Act, so far as respects goods 'captured from the enemy, and made good and lawful prize of war;' and declares that such goods, 'when imported and brought into the United States, shall pay the
p. 175 same duties as goods imported | in American vessels in the ordinary course of trade,' &c. 2d. The act of the 2d of August, 1813, which provides 'that all goods *captured from the enemy*, and made good and lawful prize of war, &c., and brought into the United States, shall be allowed a deduction of thirty-three and one third per centum.' 3d. The acts of non-importation, prohibiting the importation of British goods. 1. The goods in question being of British manufacture, could only be imported under the Prize Act, and the act of the 2d of August, 1813. They were captured from the enemy, for they were on board an enemy's vessel; they were *taken* as enemy's property; they were *captured and brought in as good and lawful prize of war*. 2. The character of the goods is determined at the time they were brought in; it is not to be determined by subsequent events: duties are payable on goods on their being first imported or brought in; and the Prize Act puts these goods on the same footing with other importations, and, of course, makes the duties on them payable at the same time. 3. The words 'good and lawful prize of war,' refer to the time of *capture*, and not of condemnation. By the very act of capture, the goods became prize; and being captured by a lawfully commissioned vessel, were good and lawful prize. The expression 'such goods,' refers to goods so captured. They are to pay *when* brought in, and not subsequently, upon condemnation. 4. The condemnation does not make the goods prize of war; it merely puts an end to the *jus recuperandi* of the former owner, and gives a new title to the purchaser. The character of
p. 176 prize is, | then, either confirmed by condemnation, or lost by restitution. If the property is restored, it is released from the character it had before borne from the time of capture, and ceases to be prize of war, but being captured and brought in as such, is to pay the prize duties.

Pinkney, for the respondents and captors. The question now raised seemed to be settled by the decision in the case of the Concord, at the last term. But, independently of authority, the question is manifestly against the claimant. 1. The goods were not entered under the Prize Act, and the act of the 2d of August, 1813; but as neutral property imported in a foreign bottom, and having been sold, are evidently liable to the full duties on such goods, unless these acts authorize a diminution of them. 2. These acts do not authorize such diminution; the goods were not captured *from the enemy*, and have never been *made good and lawful prize*. They were taken from Mr. Pinto, who was no enemy, either in fact or constructively, according to the judgment of the court. If any thing, then, has made them lawful prize, how has it happened that they have been *restored*? The claimant's counsel, to avoid the appearance

of too bold a paradox, mitigates his conclusion on this head in such a way as proves nothing for the purpose of his argument. He ends with saying, that these goods were *captured* and *brought into the United States as* good and lawful prize. He can scarcely, however, have intended to stop here; for if his conclusion goes no farther, it surrenders the | whole argument, p. 177
unless it can be shown that to seize and bring in as prize that which is not good and lawful prize, and never can become so, makes good and lawful prize of the thing so seized and brought in; or, in other words, that a seizure and bringing in, *as* prize, of neutral property, makes it, *ipso jure*, good prize, although the owner is, nevertheless, entitled to have it again, as *not* being good prize, and has, in fact, got it again accordingly. 3. The character of these goods, with reference to their liability to duty, was not determined at the time they were brought in. If they had been specifically restored, and withdrawn from the United States by the claimant, they would have been liable to no duty. 4. The words 'made good and lawful prize,' do not refer to the capture merely: the act speaks of the capture first, and then adds, 'and made good and lawful prize.' The capture, too, must be of *enemy's* goods, either in fact, or in contemplation of law. To say, that the goods are, by the act of capture, made good and lawful prize, because the capture is made by a *lawfully* commissioned cruiser, is to drop more than a moiety of the definition of *good and lawful prize*, or, rather, to insist on that which is not an essential part of its definition. Prizes may be made (as a *droit*) by a *non-commissioned* captor; but *good and lawful prize* cannot be made by any captor, unless the goods be liable to condemnation. It is the *formula* of a sentence of condemnation, to condemn the thing taken as 'good and lawful prize,' to the captors; and this not because it was taken by a lawfully commissioned cruiser, but because, being so taken, it | was under all the p. 178
circumstances subject to confiscation. 5. Capture gives possession; but it is the condemnation which ascertains that the things taken are good prize of war: until condemnation, it cannot be known whether they are good prize or not. But, certainly, it is self-evident, that after restitution it must be held, that they were *not* good prize. The condemnation does more than destroy the *jus recuperandi*. It establishes what nothing else can establish, that the goods were lawful prize. Restitution, on the other hand, establishes, conclusively, that they *never were* lawful prize, although they might be justifiably seized, upon probable cause, as such.

March 6th.

MARSHALL, CH. J., delivered the opinion of the court, that the goods were chargeable with the same rate of duties as goods imported in foreign bottoms, according to the decision in the case of the Concord at the last term.

The St. Joze Indiano.—Lizaur, claimant.

(1 Wheaton, 208) 1816.

Goods were shipped by D. B. & Co. of Liverpool, on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed, 'consigned to Messrs. D. B. & F., by order and for account of J. L.' In a letter accompanying the invoice from the shippers to the consignees, they say, 'For Mr. J. L. we open an account in our books here, and debit him, &c. We cannot yet ascertain the proceeds of his hides, &c., but find his order for goods will far exceed the amount of these shipments; therefore we consign the whole to you, that you may come to a proper understanding with him.' It was held that the goods were, during their transit, the property, and at the risk of the enemy shippers, and, therefore, subject to condemnation.

Appeal from the circuit court for the district of Massachusetts. The ship St. Joze Indiano, bound from Liverpool to Rio de Janeiro, was captured and sent into the United States, as prize of war, in the summer of 1814. The ship and most of the cargo were condemned as British property in the circuit court, and there was no appeal by any of the claimants except in behalf of Mr. J. Lizaur, of Rio de Janeiro. The right of Mr. J. Lizaur, to have restitution of property belonging to him, at the time of capture, was not contested by the captors; but it was contended, that the property in question, when captured, was at the risk of the shippers, Messrs. Dyson, Brothers & Co. of Liverpool. The
p. 209 bill of | lading did not specify any order, or account and risk. The invoice was headed, 'consigned to Messrs. Dyson, Brothers & Finnie, by order, and for account of J. Lizaur.' In a letter accompanying the bill of lading and invoice, of the 4th of May, 1814, from Dyson, Brothers & Co. to Dyson, Brothers & Finnie, they say, 'For Mr. Lizaur, we open an account in our books here, and debit him, &c. We cannot yet ascertain the proceeds of his hides, &c., but find his order for goods will *far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him.*' The house of Dyson, Brothers & Co., of Liverpool, and of Dyson, Brothers & Finnie, of Rio, consist of the same persons; goods claimed in behalf of the latter house were condemned on the ground that both firms represented the same parties in interest, and from this decision there was no appeal.

Harper, for the appellant and claimant. This case may be contrasted with those said to be similar. In the case of Kimmel and Alvers,[1] on the authority of which this portion of the cargo was condemned in the court below, the claimants had ordered the goods shipped, but there was no evidence that they had paid for any part of the goods, or that they were charged to them by the shippers. In that case the breaking

[1] The Merrimack. February term, 1814.

out of the war produced a change in the destination of the goods, and a complete control over them was retained by the vendor, which control | was exercised by his directing his agent not to deliver them without p. 210
payment in cash, in case war should have been declared before their arrival. The doctrine in the case of the Messrs. Wilkins,[1] fully bears out the present claim. In that case, the mere right of stoppage *in transitu*, was held to be vested by the shipper in his agent, to be exercised only in the event of insolvency. But in the case now before the court, the power of Dyson & Co. was limited to an arrangement for the payment of a certain part of the price only which remained unpaid. In the case of the Messrs. Wilkins no part was paid in advance, and the goods were not charged to the claimants, another circumstance which distinguishes it from the present. The case of Magee and Jones,[2] and that of Dunham and Randolph,[3] was a mere offer to sell, not a sale agreed to by the vendee, like that in the present case.

Dexter, for the respondents and captors. The case is clearly within the principles adjudged. Thus, it has been determined, incidentally, at the present term, in the case of Van Wagenen,[4] that property is not immediately vested in the correspondent by a purchase by his agent, by order, whether it be with the money of the former or latter. The case of Messrs. Wilkins was not a unanimous decision of the court, but is clearly distinguishable from the present. | Here there was no change of p. 211
possession from the shippers : the goods were in their possession during the voyage, by their agent, the master ; had the goods arrived, they would still have been in their possession, by their agents, the consignees. If the goods remained the property of the shippers at the time of shipment, and during the voyage, then they became the property of the captors, *jure belli*. They remained the property of the shippers, because they were consigned to their agents, to be delivered, *contingently*, to the claimant. Therefore the goods are confiscable as prize of war. The cases of Magee and Jones, and of Dunham and Randolph, are in point.

March 9th.

STORY, J., delivered the opinion of the court, and, after stating the facts, proceeded as follows :

The single question presented on these facts is, in whom the property was vested at the time of its transit ; if in Mr. Lizaur, then it is to be restored ; if in the shippers, then it is to be condemned. It is contended, in behalf of the claimant, that the goods having been purchased by the order, and partly with the funds, of Mr. Lizaur, the property vested in

[1] The Merrimack. February term, 1814.
[2] The Venus. February term, 1814.
[3] The Frances. February term, 1815.
[4] The Mary and Susan. 1 Wheaton, 46.

him immediately by the purchase, and the contract being executed by the sale, no delivery was necessary to perfect the legal title: that nothing was reserved to the shippers but a mere right of stoppage *in transitu*, and that if they had been burnt before the shipment, or lost during the voyage, the loss must have fallen on Mr. Lizaur. |

p. 212 The doctrine as to the right of stoppage *in transitu*, cannot apply to this case. That right exists in the single case of insolvency, and presupposes, not only that the property has passed to the consignee, but that the possession is in a third person in the transit to the consignee. It cannot, therefore, touch a case where the actual or constructive possession still remains in the shipper or his exclusive agents. In general, the rules of the prize court, as to the vesting of property, are the same with those of the common law, by which the thing sold, after the completion of the contract, is properly at the risk of the purchaser.[1] But the question still recurs, when is the contract executed? It is certainly competent for an agent abroad, who purchases in pursuance of orders, to vest the property in his principal immediately on the purchase. This is the case when he purchases exclusively on the credit of his principal,

p. 213 or makes an absolute appropriation and | designation of the property for his principal. But where a merchant abroad, in pursuance of orders, either sells his own goods, or purchases goods on his own credit, (and thereby, in reality, becomes the owner,) no property in the goods vests in his correspondent until he has done some notorious act to devest himself of his title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. Until that time he has in legal contemplation the exclusive property, as well as possession; and it is not a wrongful act in him to convert them to any use which he pleases. He is at liberty to contract upon any new engagements, or substitute any new conditions in relation to the shipment. These principles have been frequently recognised in prize causes heretofore decided in this court.[2] In the present case, the delivery to the

[1] By the common law, the right of property in the thing sold is completely vested in the purchaser by the execution of the contract, subject to the equitable right of stoppage *in transitu* in case of insolvency, and where the bill of lading has not been, in the mean time, endorsed to a third person. But by the civil law, the right of property was not vested in the purchaser, unless the goods were paid for, or sold on a credit. *Just.* l. 2. tit. 1. s. 41. *Pothier Traité de Vente*, No. 322. But this rule is not copied by the Napoleon Code, which, on the contrary, adopts a principle similar to that of the common law. *Elle (la vente) est parfaite entre les parties, et la propriété est acquise de droit a l'egard du vendeur, des qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé.* Code Napoleon, l. 3. tit. 6. c. 1. No. 1583. The French Commercial Code also subjects the goods sold to the right of stoppage *in transitu*, by the vendor, upon the same conditions with our own law. *Code de Commerce*, l. 3. tit. 3. *De la Revendication.*

[2] In the Venus, at February term, 1814, on the claim of Messrs. Magee & Jones, Mr. Justice WASHINGTON, in delivering the opinion of the court, observed: 'To effect a change of property, as between seller and buyer, it is essential that there should be a contract of sale agreed to by both parties, and if the thing agreed to be

master was not for the use of Mr. Lizaur, but for the consignees, a house composed of the same persons | as the shippers, and acting as their agents. p. 214
They, therefore, retained the constructive possession, as well as right of property, in the shippers ; and it is apparent from the letter, that the shippers meant to reserve to themselves and to their agents, in relation to the shipment, all those powers which ownership gives over property. It is material, also, in this view, that all the papers, respecting the shipment, were addressed to their own house, or to a house acting as their agents, and the claimants could have no knowledge or control of the shipment, unless by the consent of the consignees, under future arrangements to be dictated by them. In this view this case cannot be distinguished from that of Messrs. Kimmell and Alvers ; and it steers wide of the distinction upon which Messrs. Wilkins' claim was sustained.[1] The authorities also cited at the argument by the captors are exceedingly strong to the same effect. The Aurora[2] approaches very near to the present case. There the shipment, by the express agreement of the parties, was, in reality, going for the use, and by the order, of the purchaser, but consigned to other persons, who were to deliver them if they were satisfied for the payment. And Sir William Scott there quotes a case as having been lately decided, where goods sent by a merchant in Holland, to A., a person in America, by order, and for account, of B., with directions not to deliver them unless satisfaction should be given for the payment, were condemned as the property of the Dutch shippers.|

On the whole, the court are unanimously of opinion, that the goods p. 215
included in this shipment were, during their transit, the property, and at the risk of the shippers, and, therefore, subject to condemnation. The claim of Mr. Lizaur must, therefore, be rejected.

Sentence affirmed with costs.

purchased is to be sent by the vendor to the vendee, it is necessary to the perfection of the contract that it should be delivered to the purchaser, or to his agent, which the master of a ship to many purposes is considered to be.' And adverting to the facts of that claim, he further says : ' The delivery of the goods to the master of the vessel was not for the use of Magee & Jones, any more than it was for the shipper solely, and consequently it amounted to nothing so as to devest the property out of the shipper until Magee should elect to take them on joint account, or to act as the agent of Jones.'

[1] The Merrimack. February Term, 1814.

[2] 4 *Rob.* 218.

L'Invincible.—The Consul of France, and Hill and M'Cobb, claimants.

(1 Wheaton, 238) 1816.

During the late war between the United States and Great Britain, a French privateer, duly commissioned, was captured by a British cruiser, afterwards recaptured by an American privateer; again captured by a squadron of British frigates, and recaptured by another American privateer, and brought into a port of the United States for adjudication. Restitution, on payment of salvage, was claimed by the French consul. A claim was also interposed by citizens of the United States, who alleged that their property had been unlawfully taken by the French vessel before her first capture, on the high seas, and prayed an indemnification from the proceeds. Restitution to the original French owner was decreed; and it was held, that the courts of this country have no jurisdiction to redress any supposed torts committed on the high seas upon the property of its citizens by a cruiser regularly commissioned by a foreign and friendly power, except where such cruiser has been fitted out in violation of our neutrality.

APPEAL from the circuit court for the district of Massachusetts.

The French private armed ship L'Invincible, duly commissioned as a cruiser, was, in March, 1813, captured by the British brig of war La Mutine. In the same month she was recaptured by the American privateer Alexander; was again captured, on or about the 10th of May, 1813, by a British squadron, consisting of the frigates Shannon and Tenedos; and, afterwards, in the same month, again recaptured by the American
p. 239 privateer Young | Teazer, carried into Portland, and libelled in the district court of Maine for adjudication, as prize of war. The proceedings, so far as material to be stated, were as follows: At a special term of the district court, held in June, 1813, a claim was interposed by the French consul on behalf of the French owners, alleging the special facts above mentioned, and claiming restitution of the ship and cargo, on payment of salvage. A special claim was also interposed by Mark L. Hill, and Thomas M'Cobb, citizens of the United States, and owners of the ship Mount Hope, alleging, among other things, that the said ship, having on board a cargo on freight, belonging to citizens of the United States, and bound on a voyage from Charleston, S. C. to Cadiz, was, on the high seas, in the latter part of March, 1813, in violation of the law of nations, and of treaties, captured by L'Invincible, before her capture by La Mutine, and carried to places unknown to the claimants, whereby the said ship Mount Hope, and cargo, became wholly lost to the owners, and thereupon praying, among other things, that after payment of salvage, the residue of said ship L'Invincible, and cargo, might be condemned and sold for the payment of the damages sustained by the claimants. At the same term, by consent, an interlocutory decree of condemnation to the captors passed against said ship L'Invincible, and

she was ordered to be sold, and one moiety of the proceeds, after deducting expenses, was ordered to be paid to the captors, as salvage, and the other moiety to be brought into court, to abide the final decision of the respective claims of | the French consul and Messrs. Hill & M'Cobb. The p. 240
cause was then continued for a further hearing unto September term, 1813, when Messrs. Maisonarra & Devouet, of Bayonne, owners of L'Invincible, appeared under protest, and in answer to the libel and claim of Messrs. Hill & M'Cobb alleged, among other things, that the ship Mount Hope was lawfully captured by L'Invincible, on account of having a British license on board, and of other suspicious circumstances, inducing a belief of British interests, and ordered to Bayonne for adjudication; that (as the protestants believed) on the voyage to Bayonne the Mount Hope was recaptured, by a British cruiser, sent into some port of Great Britain, and there finally restored by the court of admiralty to the owners, after which she pursued her voyage, and safely arrived, with her cargo, at Cadiz, and the protestants thereupon prayed that the claim of Messrs. Hill & M'Cobb might be dismissed. The replication of Messrs. Hill and M'Cobb denied the legality of the capture, and the having a British license on board the Mount Hope, and alleged embezzlement and spoliation by the crew of L'Invincible, upon the capture; admitted the recapture by a British cruiser, and the restitution by the admiralty upon payment of expenses, and prayed that the protestants might be directed to appear absolutely and without protest. Upon these allegations the district court overruled the objections to the jurisdiction of the court, and compelled the owners of L'Invincible to appear absolutely, and without protest, and thereupon the | owners appeared absolutely, p. 241
and alleged the same matters in defence which were stated in their answer under protest, and prayed the court to assign Messrs. Hill & M'Cobb to answer interrogatories touching the premises, which was ordered by the court. Accordingly, Messrs. Hill & M'Cobb made answer to the interrogatories proposed, except an interrogatory which required a disclosure of the fact, whether there was a British license on board, which M'Cobb (who was master of the Mount Hope at the time of the capture) declined answering, upon the ground that he was not compelled to answer any question, the answer to which would subject him to a penalty, forfeiture, or punishment; and this refusal, the district court, on application, allowed. Hill, in answer to the same interrogatory, denied any knowledge of the existence of a British license. The cause was, thereupon, heard on the allegations and evidence of the parties, and the district court decreed that Messrs. Hill & M'Cobb should recover against the owners of L'Invincible the sum of 9,000 dollars damages, and the costs of suit. From this decree the owners appealed to the circuit court, and in that court their plea to the jurisdiction was sustained, and the claim

of Messrs. Hill & M'Cobb dismissed, with costs. An appeal was, thereupon, entered by them to this court.

Dexter, for the appellants. The sole question is, whether the district court of Maine had jurisdiction. It is a case where a citizen, against
p. 242 whose property | a tort has been committed on the high seas, appears in his own natural forum, and the *res*, which was the instrument of the wrong done, is within the territorial jurisdiction of his own country, and in possession of the court for other (lawful) purposes when he applies for justice. 1. An injury of this nature is either to be redressed by a process *in rem* or *in personam*, and in either case, application must be made where the *thing*, or *person*, is found. The action is transitory in both cases: where the party proceeds *in rem*, the possession of the thing gives jurisdiction to the tribunal having that possession. It is said, that in prize proceedings, the forum of the captor is the only one having jurisdiction. But what is the extent of the principle, and what are the exceptions to the rule? The rule is not of a nature peculiar to prize proceedings, but is rather a corollary from the general principles of admiralty jurisdiction. The locality of the question of prize or no prize must have been originally determined by the *fact* of the property being carried *infra præsidia* of the captor's country, and in possession of its courts. I agree that the possession of the thing does not give jurisdiction to a *neutral* country, and the reason is, because the country *is neutral*. But this has only been recently settled; and in the reign of Charles II. the question was referred to the crown lawyers in England, (then neutral,) whether the property of English subjects, unjustly taken by foreign cruisers, should not be restored to them by the English court.[1] |
p. 243 It is, however, now determined that, unless there has been a breach of neutrality in the capture, the courts of a neutral state cannot *restore*, much less *condemn*. But this concession does not shake the position, that local jurisdiction is founded upon the possession of the *res*, which in this case having escaped from the former captor, the action becomes transitory, and follows the thing. There are several decisions of this court, all confirming, either directly or by analogy, the position now taken.[2] In the famous report of Sir George Lee, &c., on the memorial of the king of Prussia's minister, relative to the non-payment of the Silesian loan, which was intended to maintain the strongest maritime pretensions of Great Britain, the only passage that even glances at the doctrine of the exclusive jurisdiction of the courts of the captor's country is, that all captors are bound to submit their seizures to adjudication, and that the *regular and proper* court is that of their own country. But this principle is sustained rather by the authority of usage and treaties,

[1] 2 *Browne's Civ.* and *Adm. Law*, 256.

[2] 3 *Dall.* 6, Glass *v.* the Betsey. 3 *Dall.* 133, Talbot *v.* Jansen. 3 *Dall.* 333, Del. Col. *v.* Arnold. 3 *Dall.* 138, The Mary Ford.

than by elementary writers; and yet, all the other incidental questions are illustrated by multifarious citations of elementary books, equally respected in Prussia as in England. The reporters do not fairly meet the menace of the Prussian monarch, to set up courts of prize in his own dominions; but content themselves with asserting that it would be irregular, absurd, and impracticable. | Had it been at that time settled p. 244
by European jurists of authority, the question would not have been made; or if made, would have been satisfactorily answered. The general principle has been rather *assumed*, than *proved*: And the practice of one nation, at least, contradicts it; for the ordinance of Louis XIV. restores the property of French subjects brought into the ports of France.[1]

2. Suppose the | question of prize or no prize to be exclusively within p. 245
the jurisdiction of the courts of the capturing power, yet that question does not arise in the present case. This is a question of *probable cause*. If the commander of L'Invincible took *without* probable cause, he had no right; if he took *with* probable cause, then the claimants have sustained no injury, and ought not to recover damages; consequently, no injury can result from the court taking cognizance of the suit. As

[1] *Ordonnance de la Marine*, liv. 3. tit. 9., *Des Prises, art.* 15. The same provision is contained in the 16th article of the Spanish ordinance of 1718; and Valin considers the restitution of the effects as a just recompense for the benefit rendered to the captor, in granting him an asylum in the ports of the neutral country to whose subjects those effects belong. But Azuni contests this opinion, and maintains that the obligation to restore in this case is founded on the universal law of nations. Part 2, c. 4. art. 3. s. 18. And it must be confessed, that the reasons on which Valin rests his opinion are by no means satisfactory; so that the French and Spanish ordinances are evidently mere municipal regulations, which have not been incorporated into the code of public law, and cannot be justified upon sound principles. It is an observation, somewhere made by M. Portalis, that such regulations are not, properly speaking, to be considered *laws*, but are essentially variable in their nature, *pro temporibus et causis*, and are to be tempered and modified by judicial wisdom and equity. These ordinances are indeed supported by the practice of the Italian states, and the theory of certain Italian writers. Among the latter are Galliani and Azuni, both of whom maintain, each upon different grounds, the right of the neutral power, within whose territorial jurisdiction a prize is brought, to adjudicate upon the question of prize or no prize, so far as the property of its own subjects are concerned. They are, however, opposed by their own countryman, Lampredi, who, after assigning the reasons for his dissent, concludes thus,—'*Egli*' (the neutral) *dunque dovrà rispettare questo possesso* (that of the captor) *lasciando che i giudici costituiti dal Sovrano del predatore lo dichiarino o legittimo, o illegittimo, e così o liberino la preda, o la facciano passare in dominio del predatore, purchè questo giudizio si faccia fuori del suo territorio, ove nessuno usurpar può i dirriti spettanti al sommo impero. E falso adunque in dirrito quello, che asserisce il Galiani, ed il progetto, ch'egli propone sul giudizio delle prede non si portrebbe eseguire senza lesione dei dirritti sovrani. Lampredi*, p. 228. Since the decision of the case to which this note is appended, the following may be considered as the only exceptions to the general rule, that the question of prize or no prize, with all its incidents, is only to be determined in the courts of the captor's nation established in his country, or in that of an ally or co-belligerant. 1st. The case of a capture made by the cruisers of the belligerants within the jurisdiction of a neutral power; and 2d, That of a capture made by armed vessels fitted out in violation of its neutrality, and where the captured property, or the capturing vessel, is brought into its ports. The obvious foundation of these exceptions is to be discovered in the right and the duty of every neutral state to maintain its neutrality impartially, and neither to do nor suffer any act which might tend to involve it in the war.

to the spoliation after the capture, that is still less a question of prize. 3. But be the general principles as they may, the jurisdiction having attached for other purposes on recapture, the former owner of a vessel unlawfully taken and despoiled by the prize, comes in and claims damages under the law of nations.

p. 246 *Pinkney*, contra. If there be any rule of public | law better established than another, it is, that the question of prize is solely to be determined in the courts of the captor's country. The report on the memorial of the king of Prussia's minister, refers to it as the customary law of the whole civilized world. The English courts of prize have recorded it; the French courts have recorded it; this court has recorded it. It pervades all the adjudications on the law of prize, and it lays, as an elementary principle, at the very foundation of that law. The whole question, then, is, whether this case be an exception to the general rule. The positive law of nations has ordained the rule; the natural law of nations has assigned the reasons on which it is founded; and *Rutherforth*, in his Institutes,[1] explains those reasons, which arise from the amenability of governments to each other. A cruiser is amenable only to the government by whom he is commissioned; that government is amenable to the power whose subjects are injured by him; and after the ordinary prize judicature is exhausted, they are to apply to their own sovereign for redress. The principal object of that judicature is the examination into the conduct of the captors. The question of property is merely incidental. But, whatever the question may be, it is to be judged exclusively by the courts of the capturing power. It is contended, on the other side, that this jurisdiction must be exerted *in rem*; but the jurisdiction to which *Rutherforth* refers is much more extensive, not confining it to the question whether the property be translated.

p. 247 If the | thing be within the possession of the court, then it exerts a jurisdiction *in rem*, by restitution, or condemnation, as the case may be. But if not, then it exerts it on the person, and inquiries into the manner in which the captor has used his commission, and whether any wrong has been done to friends, under colour of its authority. It is a gratuitous assumption, that prize jurisdiction is always *in rem*, as that of the ordinary court of admiralty usually is. The commissioned captor cannot be responsible to any but his own sovereign; from him he receives the law which forms his rule of conduct. Sir William Scott expressly admits that his king can give him the law, and the judges of other European countries practically admit the same thing. *A fortiori*, can the sovereign give it to his delegated cruisers; he being answerable over, in the first instance, diplomatically, and finally by war, to the injured nation. The captor is responsible only through the courts of his own country.

[1] 2 *Rutherforth's Institutes*, 594.

2. Is this case an exception to the general rule? The reasons of the allowed exceptions do not apply to this case. Thus the cases are, of violation of neutral territory; or where a commission is issued to subjects of the neutral country; or, lastly, of a prize brought into its territorial limits with neutral property on board. In the case of Talbot v. Jansen the commission was null, and captures under it were void; it was equivalent to no commission at all. Here is no pretence that the commission was null; that she had been fitted out here; or that the thing captured had been brought within the grasp of our municipal law; or that the capture was made within our limits. In | Del Col v. Arnold p. 248
the ground of the decision was, that the thing was brought voluntarily into our limits, and the wrong done within those limits. The judgment must be supported on that ground, or it cannot be supported at all. As to the Betsey, its authority is doubtful, and it cannot be referred to any intelligible principle, unless it be that the belligerant captor submits to the neutral jurisdiction, by bringing the property within it. The Cassius,[1] is directly in point for the captors in the case now before the court. Why was the libellant's application refused in that case? Because the thing captured was not brought in; thereby showing that, in the present case, the prize not having been brought in, damages cannot be awarded against the captor. As to the ordinance of Louis XIV., it goes no further than this court did in the case of the Betsey. The same authority has been practically assumed among the Italian states; but further no nation, ancient or modern, has gone. The natural, customary, and conventional law of nations, are all equally adverse to it. The claimants have a remedy, correspondent to the extent of their injury, in the courts of France. The prize jurisdiction is as effectually exerted when the property *is not*, as when *it is*, within its control. The cases are multiplied where the thing is even lost, of an application compelling the captor to proceed to adjudication; if he fails to show that the capture was lawful, he is mulcted in costs and damages.[2] The cruisers of | every p. 249
nation are bound to obey the instructions of the sovereign power, whether lawful or not. The condemnations under the British orders in council of November, 1793, were reversed by the lords of appeal, and mere dry restitution decreed, without damages, because the cruisers were justified by the instructions. But the commissioners under the 7th article of the British treaty of 1794, gave damages for what the lords of appeal were obliged judicially to refuse them, upon the authority of *Rutherforth*, and upon the ground that the British government was answerable over to the injured power. In the present case, if justice should be refused in the courts of France, the French government would be answerable over to this country. The process is here, in effect, *in personam*, and it

[1] 3 *Dall.* 121.

[2] 1 *Rob.* 93. The Betsey.

is as if the captor were here. You go beyond retaining your own property merely, and lay your hand on his; which is his by the municipal code only: by the law of nations it is the property of the state. It is certain he was not originally responsible personally, and the capture and recapture can have made no difference. The acts exerted over him by the enemy could not have changed his responsibility; nor can the captor's having failed to proceed to adjudication in France, for the claimants may compel him; nor the bringing in of his vessel, for, as to him, it was involuntary. 3. *Probable cause* is emphatically a question of prize or no prize; but it is not always the same by the law of different countries. The law of France must, therefore, be looked into, and applied to the case, which the French courts only are competent to expound. If their |
p. 250 exposition does injustice to the party, his remedy is by application to his own government. So, also, is the question of spoliation a question of prize; and the prize court, having jurisdiction of the principal matter, has jurisdiction of all its incidents.

Dexter, in reply. 1. There is only one authority produced to show that the prize jurisdiction is exclusively in the courts of the capturing power. *Rutherforth* speaks only of cases where the proceeding is to condemn, or restore, the captured property. When he, or any other writer, gives the reasons for his opinion, the latter is worth just as much as the former, and no more. What is the reason? He says it cannot be known before trial that forcible possession was lawful; and if unlawful, it could not give jurisdiction. It may be answered, in every case where jurisdiction is gained by possession, it is unknown before trial whether it was obtained lawfully, or by force, or fraud. All right of jurisdiction from possession is thus equally denied. The other party cannot be injured by submitting to the jurisdiction while that uncertainty remains. If it shall appear that the possession was unlawfully acquired, he will be restored to his right by the exercise of jurisdiction. *Rutherforth* asserts, that the true ground of prize jurisdiction is, that the state of the captor is responsible to other states for his misconduct. It may be answered, that when the state has only granted a lawful commission, and has not assented to any unlawful act done by colour of it, such state is not
p. 251 responsible, though the act be unlawful. | For the naked unauthorized act, then, the state is not accountable. The unjust judgment of a neutral state, condemning the property, might make the latter state answerable, but not the former. The reasoning goes on the supposition that the state of the captor might relieve itself from responsibility by doing justice, in restoring the property. This can only be done where the property can be reached by it. Holding jurisdiction would rather relieve the state of the captor from responsibility; for either the injury of the complaining party would be repaired, or the courts of his own

country would determine that he had not suffered any. There is no distinction between the property being lawfully brought in, as in this case, or voluntarily, as in the case of the Betsey. The injured party has an election to proceed *in personam* against the owners, or *in rem* against the inanimate instrument of the wrong. 2. There may be a jurisdiction to *restore*, without invading the exclusive prize jurisdiction of the captor's country. Let the court take jurisdiction, and if it turns out to be a question of prize or no prize, then dismiss the suit. Suppose the question to be, whether the captor had a commission, must we not proceed further, and see what is the extent of that commission? And if the act done exceed its limits, has not the neutral state a right to adjudge costs and damages to its citizens injured, without any authority from the captor's sovereign? 3. The vessel is in judicature, rightfully and lawfully. The party now protesting against the jurisdiction, had submitted to it for another purpose. He claims his property upon the payment of salvage. | The obvious answer to his demand is, When you have p. 252
discharged all liens, you shall have it. The court of admiralty, having jurisdiction for another purpose, like a court of chancery in the case of a mortgage, has a right to do complete equity. Why is restitution decreed in the case of violated territory? Because the courts of the neutral state, having jurisdiction for the principal purpose of avenging its violated sovereignty, also takes jurisdiction of all the incidents.

March 11*th.*

JOHNSON, J., delivered the opinion of the court.

It would be difficult to distinguish this case, in principle, from those of the Cassius and the Exchange,[1] decided in this court. The only circumstance, in fact, in which they differ, is, that in those cases, the vessels were the property of the nation; in *this* it belongs to private adventurers. But the commission under which they acted was the same; the same sovereign power which could claim immunities in those cases equally demands them in this; and although the privateer may be considered a volunteer in the war, it is not less a part of the efficient national force, set in action for the purpose of subduing an enemy. There may be, indeed, one shade of difference between them, and it | p. 253
is that which is suggested by *Rutherforth* in the passage quoted in the argument. The hull, or the owners of the privateer, may, perhaps, under some circumstances, be subject to damages in a neutral court

[1] February Term, 1812. In this case it was determined that a public vessel of war, belonging to the Emperor Napoleon, which was before the property of a citizen of the United States, and, as alleged, wrongfully seized by the French, coming into our ports, and demeaning herself in a friendly manner, was exempt from the jurisdiction of this country, and could not be reclaimed by the former owner in its tribunals.

after the courts of the captor have decided that the capture was not sanctioned by his sovereign. But, until such a decision, the seizure by a private armed vessel is as much the act of the sovereign, and entitled to the same exemption from scrutiny, as the seizure by a national vessel. In the case of the Cassius, which belonged to the French republic, the vessel was finally prosecuted and condemned on an information *qui tam*, under the act of Congress for an illegal out-fit, and thus had applied to her, under the statute, the principle which dictated the decision in the case of Talbot v. Jansen with relation to a private armed vessel. As to the restitution of prizes, made in violation of neutrality, there could be no reason suggested for creating a distinction between the national and the private armed vessels of a belligerent. Whilst a neutral yields to other nations the unobstructed exercise of their sovereign or belligerant rights, her own dignity and security require of her the vindication of her own neutrality, and of her sovereign right to remain the peaceable and impartial spectator of the war. As to her, it is immaterial in whom the property of the offending vessel is vested. The commission under which the captors act is the same, and that alone communicates the right of capture even to a vessel which is national property. |

p. 254 But it is contended that, admitting the general principle, that the exclusive cognizance of prize questions belongs to the capturing power, still the peculiar circumstances of this case constitute an exception, inasmuch as the recapture of the Mount Hope puts it out of the power of the French courts to exercise jurisdiction over the case. This leads us to inquire into the real ground upon which the exclusive cognizance of prize questions is yielded to the courts of the capturing power. For the appellants, it is contended, that it rests upon the *possession* of the subject matter of that jurisdiction ; and as the loss of possession carries with it the loss of capacity to sit in judgment on the question of prize or no prize, it follows, that the rights of judging reverts to the state whose citizen has been devested of his property. On the other hand, I presume, by the reference to Rutherforth, we are to understand it to be contended that it is a right conceded by the customary law of nations, because the captor is responsible to his sovereign, and the sovereign to other nations.

But we are of opinion that it rests upon other grounds ; and that the views of Vattel on the subject are the most reconcilable to reason, and the nature of things, and furnish the easiest solution of all the questions which arise under this head. That it is a consequence of the equality and absolute independence of sovereign states, on the one hand, and of the duty to observe uniform impartial neutrality, on the other.

Under the former, every sovereign becomes the acknowledged arbiter
p. 255 of his own justice, and cannot, | consistently with his dignity, stoop to

appear at the bar of other nations to defend the acts of his commissioned agents, much less the justice and legality of those rules of conduct which he prescribes to them. Under the latter, neutrals are bound to withhold their interference between the captor and the captured; to consider the fact of possession as conclusive evidence of the right. Under this it is, also, that it becomes unlawful to devest a captor of possession even of the ship of a citizen, when seized under a charge of having trespassed upon belligerant rights.

In this case the capture is not made as of a vessel of the neutral power; but as of one who, quitting his neutrality, voluntarily arranges himself under the banners of the enemy. On this subject there appears to be a tacit convention between the neutral and belligerant; that, on the one hand, the neutral state shall not be implicated in the misconduct of the individual; and on the other, that the offender shall be subjected to the exercise of belligerant right. In this view the situation of a captured ship of a citizen is precisely the same as that of any other captured neutral; or, rather, the obligation to abstain from interference between the captor and captured becomes greater, inasmuch as it is purchased by a concession from the belligerant, of no little importance to the peace of the world, and particularly of the nation of the offending individual. The belligerant contents himself with cutting up the unneutral commerce, and makes no complaint to the neutral power, not even | where the indi- p. 256
vidual rescues his vessel, and escapes into his own port after capture.

Testing this case by these principles, it will be found that, to have sustained the claim of the appellants, the court below would have violated the hospitality which nations have a right to claim from each other, and the immunity which a sovereign commission confers on the vessels which act under it; that it would have detracted from the dignity and equality of sovereign states, by reducing one to the condition of a suitor in the courts of another, and from the acknowledged right of every belligerant to judge for himself when his own rights on the ocean have been violated or evaded; and, finally, that it would have been a deviation from that strict line of neutrality which it is the universal duty of neutrals to observe—a duty of the most delicate nature with regard to her own citizens, inasmuch as through their misconduct she may draw upon herself the imputation of secretly supporting one of the contending parties. Under this view of the law of nations on this subject, it is evident that it becomes immaterial whether the *corpus* continue *sub potestate* of the capturing power, or not. Yet, if the recapture of the prize necessarily draws after it consequences so fatal to the rights of an unoffending individual as have been supposed in the argument, it may well be asked, shall he be referred for redress to courts which, by the state of facts, are rendered incompetent to afford redress?

The answer is, that this consequence does not follow from the recap-
p. 257 ture. The courts of the captor | are still open for redress. The injured neutral, it is to be presumed, will there receive indemnity for a wanton or illicit capture; and if justice be refused him, his own nation is bound to vindicate, or indemnify him.

Some confusion of idea appears to hang over this doctrine, resulting chiefly from a doubt as to the mode in which the principle of exclusive cognizance is to be applied in neutral courts to cases as they arise; and this obscurity is increased by the apparent bearing of certain cases decided in this court in the years 1794 and 1795.

The material questions necessary to be considered, in order to dissipate these doubts, are, 1st. Does this principle properly furnish a plea to the jurisdiction of the admiralty courts? 2d. If not, then does not jurisdiction over the subject matter draw after it every incidental or resulting question relative to the disposal of the proceeds of the *res subjecta?*

The first of these questions was the only one settled in the case of Glass v. The Betsey, and the case was sent back with a view that the district court should exercise jurisdiction, subject, however, to the law of nations on this subject as the rule to govern its decision.

And this is certainly the correct course. Every violent dispossession of property on the ocean is, *prima facie*, a maritime tort; as such, it belongs to the admiralty jurisdiction. But sitting and judging, as such courts do, by the law of nations, the moment it is ascertained to be a seizure by a commissioned cruiser, made in the legitimate exercise of
p. 258 the rights | of war, their progress is arrested; for this circumstance is, in those courts, a sufficient evidence of right.

That the mere fact of seizure as prize does not, of itself, oust the neutral admiralty court of its jurisdiction, is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to devest possessions; to wit, those in which her own right to stand neutral is invaded: and there is no case in which the court of a neutral may not claim the right of determining whether the capturing vessel be, in fact, the commissioned cruiser of a belligerant power. Without the exercise of jurisdiction thus far, in all cases, the power of the admiralty would be inadequate to afford protection from piratical capture. The case of Talbot v. Jansen, as well in the reasoning of the judges as in the final decision of the case, is fully up to the support of this doctrine. But it is supposed that the case of the Mary Ford supports the idea, that as the court had acknowledged jurisdiction over the question of salvage, its jurisdiction extended over the whole subject matter, and authorized it to proceed finally to dispose of the residue between the parties litigant.

That case certainly will not support the doctrine to the extent contended for in this case. It is true, that the court there lay down a principle, which, in its general application is unquestionably correct, and which, considered in the abstract, might be supposed applicable to the present case. But this presents only one of innumerable cases which occur in | our books to prove how apt we are to misconceive and misapply p. 259
the decisions of a court, by detaching those decisions from the case which the court propose to decide. The decision of the supreme court in that case is in strict conformity with that of the circuit court in the present case. For when the court come to apply their principle, they do not enter into the question of prize between the belligerants, but decree the residue to the last possessor: thus making the fact of possession, as between the parties litigant, the criterion of right; and this is, unquestionably, consistent with the law of nations. Those points, which can be disposed of without any reference to the legal exercise of the rights of war, the court proceeds to decide; but those which necessarily involve the question of prize or no prize, they remit to another tribunal.

It would afford us much satisfaction could we, with equal facility, vindicate the consistency of this court in the case of Del Col v. Arnold. To say the least of that case, it certainly requires an apology. We are, however, induced to believe, from several circumstances, that we have transmitted to us but an imperfect sketch of the decision in that case. The brevity with which the case is reported, which we are informed had been argued successively at two terms, by men of the first legal talents, necessarily suggests this opinion; and when we refer to the case of the Cassius, decided but the term preceding, and observe the correctness with which the law applicable to this case, in principle, is laid down in | the recital to the prohibitions, we are confirmed in that opinion. p. 260

But the case itself furnishes additional confirmation. There is one view of it in which it is reconcilable to every legal principle. It appears that, when pursued by the Terpsicore, the Grand Sachem was wholly abandoned by the prize crew, and left in possession of one of the original American crew, and a passenger; that, in their possession, she was driven within our territorial limits, and was actually on shore when the prize crew resumed their possession, and plundered and scuttled her. Supposing this to have been a case of total dereliction, (an opinion which, if incorrect, was only so on a point of fact, and one in support of which much might be said, as the prize crew had no proprietary interest, but only a right founded on the fact of possession,) it would follow, that the subsequent resumption of possession was tortious, and subjected the parties to damages. On the propriety of the seizure of the Industry, to satisfy those damages, the court give no opinion, but place the application of the proceeds of the sale of this vessel on the ground of consent;

a principle, on the correctness of the application of which to that case, the report affords no ground to decide.

But, admitting that the case of the Grand Sachem was decided under the idea that the courts of the neutral can take cognizance of the legality of belligerant seizure, it is glaringly inconsistent with the acknowledged doctrine in the case of the Cassius and of Talbot v. Jansen, decided the
p. 261 term next | preceding; and in the Mary Ford, decided at the same term with that of the Grand Sachem. The subject has frequently, since that term, been submitted to the consideration of this court, and the decision has uniformly been, that it is a question exclusively proper for the courts of the capturing power.

Sentence affirmed.

The Harrison.—Herbert, claimant.

(1 Wheaton, 298) 1816.

If the national character of property, captured and brought in for adjudication, appears ambiguous or neutral, and no claim is interposed, the cause is postponed for *a year and a day* after the prize proceedings are commenced; and if no claimant appears within that time, the property is condemned to the captors.

In prize causes this court has an appellate jurisdiction only, and a claim cannot for the first time be interposed here; but where the court below had proceeded to adjudication before the above period had elapsed, the cause was remanded to that court, with directions to allow a claim to be filed therein, and the libel to be amended, &c.

Appeal from the circuit court for the district of Maryland. The libel filed by the captors, in this case, in the district court, alleged, that the goods for which condemnation was sought, were captured and taken out of a Spanish vessel. No claim was filed for the goods in either of the courts below. But, upon the hearing, the district court dismissed the libel, upon the ground, that the property, to whomsoever belonging, was
p. 299 protected by the 15th article | of the treaty of 1795 with Spain, by which, free ships make free goods; and this decree was affirmed, upon the same principle, in the circuit court. The captors brought the cause, by appeal, to this court; and a motion was made by *Winder*, in behalf of Elry Herbert, an asserted claimant, to be admitted to file a claim in this court.

March 18th.

Story, J., delivered the opinion of the court.

We have considered this question with a view to the general rules of practice. Whenever a prize is brought to adjudication in the admiralty, if, upon the hearing of the cause upon the ship's papers, and the evidence taken in preparatory, the property appears to belong to enemies, it is immediately condemned. If its national character appear doubtful, or

even neutral, and no claim is interposed, the court do not proceed to a final decree, but the cause is postponed, with a view to enable any person, having title, to assert it, within a reasonable time, before the court. This reasonable time has been, by the general usage of nations, fixed to a year and a day after the institution of the prize proceedings; and if no claim be interposed within that period, the property is deemed to be abandoned, and is condemned to the captors for contumacy and default of the supposed owner. In the present case the prescribed period had not elapsed at the time when the district court proceeded to decree a dismissal of the libel. A claim cannot, by the practice of *this* court, be for the first time interposed here. In prize causes this court can exercise only an appellate jurisdiction, and between | parties who have litigated p. 300
in the court below. We are all, therefore, of opinion that this cause ought to be remanded to the circuit court, with directions to allow the claim to be filed in that court; and, also, to allow the libel to be amended so as to conform to the general allegation of prize, and enable the captors to obtain condemnation of the property, if the asserted claim shall not be sustained, and the property shall not appear entitled to the protection of the Spanish treaty.

Case remanded.

The Commercen.—Lindgren, claimant.

(1 Wheaton, 382) 1816.

Provisions, neutral property, but the growth of the enemy's country, and destined for the supply of the enemy's military or naval forces, are contraband.

Provisions, neutral property, and the growth of a neutral country, destined for the general supply of human life in the enemy's country, are not contraband.

Freight is never due to the neutral carrier of contraband.

Quære, in what cases the vehicle of contraband is confiscable?

A neutral ship, laden with provisions, enemy's property, and the growth of the enemy's country, specially permitted to be exported for the supply of his forces, is not entitled to freight.

It makes no difference in such a case, that the enemy is carrying on a distinct war, in conjunction with his allies, who are friends of the captor's country, and that the provisions are intended for the supply of his troops engaged in that war, and that the ship in which they are transported belongs to subjects of one of those allies.

APPEAL from the circuit court for the district of Massachusetts. This was the case of a Swedish vessel | captured on the 16th of April, p. 383
1814, by the private armed schooner Lawrence, on a voyage from Limerick, in Ireland, to Bilboa, in Spain. The cargo consisted of barley and oats, the property of British subjects, the exportation of which is generally prohibited by the British government; and, as well by the official

papers of the custom-house, as by the private letters of the shippers, it appears to have been shipped under the special permission of the government, for the sole use of his Britannic majesty's forces then in Spain. Bonds were accordingly given for the fulfilment of this object. At the hearing in the district court of Maine, the cargo was condemned as enemy's property, and the vessel restored, with an allowance, among other things, of the freight for the voyage, according to the stipulation of the charter-party. The captors appealed from so much of the sentence as decreed freight to the neutral ship; and, upon the appeal to the circuit court of Massachusetts, the decree, as to freight, was reversed, and from this last sentence an appeal was prosecuted to this court.

Key, for the appellant and claimants. 1. The general principle of law allows freight to the neutral carrier of enemy's property. It is incumbent upon the captors to show, that this case forms an exception to the rule, which they can only do by alleging this to be an unlawful interposition in the war between the United States and Great Britain; but an interposition in the Peninsular war, was not necessarily an inter-
p. 384 position in the American war. Were it | so, it would follow that the Spaniards and Swedes might not trade with the United States, they being the allies of Great Britain; as the prize courts of England decide, that the subjects of an ally cannot lawfully trade with the common enemy. *Bynkershoek* puts the case of two powers allied during a truce, but before enemies:[1] What would be the situation of neutrals? If they came to the assistance of either, they might be liable to be treated as enemies by the other. In the present instance, if the British forces had been so situated as that they might operate against the United States as well as France, it would alter the case. But remote and uncertain consequences cannot be held to affect the conduct of neutrals with illegality. 2. There is no proof or presumption that the master knew the special destination of the cargo. His act cannot be unlawful, unless done knowingly and wilfully, as in the case of carrying enemy's despatches, where Sir William Scott at first went entirely on the ground of the master's privity; afterwards he adopted a rule more strict and severe; but still knowledge was held to be necessary, and presumed wherever there was a want of extraordinary diligence on the part of the master. It is conceded that the *onus* is on the claimant to show his ignorance of the contents of the papers concerning the cargo, which, if the present testimony is not sufficient, may be done upon farther proof. |

p. 385 [STORY, J. Ignorance of the master was not pretended in the court below.]

Dexter, for the respondents and captors. The rule, that the neutral carrier of enemy's property is entitled to freight, is a mitigated rule,

[1] *Q. J. Pub. L.* 16. p. 125. of Du Ponceau's Translation.

and *Bynkershoek* argues with much force against its reasonableness.[1] But the master, in the present case, is not entitled to the benefit of it, having, by his conduct, made himself an enemy, *pro hac vice*. The principle, as to the nature of the Spanish war, was settled when the court determined that to carry goods to Lisbon, under a British license, was cause of confiscation. Can a party in a similar predicament be entitled to freight? Can a neutral stand on any better ground than a citizen? Either the British troops in the peninsula were enemies or friends? If enemies, this is an interposition which cannot be permitted to neutrals. Being at war, the British fleets and armies were hostile in every quarter of the globe. Where shall the line be drawn to mark when they became our enemies? At what period from the time of their landing in Portugal, until their crossing the Pyrennees, and embarking at Bordeaux for the United States? It is impossible to aid the operations of our enemy in any part of the world, without strengthening his means of annoying us. The very men fed by this trade came here to fight us on our own soil, and to destroy our capital. It is said that this involves the consequence that we were at war | with Spain and Portugal; but it depends upon the p. 386
councils of every country to judge what acts of hostility shall render it expedient to make war; it depended on us to be at war with the allies of our declared enemy. It is a general rule that it is not unlawful to carry provisions to a neutral country; but if the enemy be there, and the articles are destined for his use, it is unlawful. The whole evidence shows that the master knew he was carrying provisions for the supply of the British forces, and his ignorance of the law is immaterial. But even if it were material, the inflamed rate of freight shows that he was conscious of the risk he run.

Harper, in reply. The principle contended for by the captors is *stricti juris*, and extreme in its application to this particular case, where there is nothing like moral guilt in the conduct of the master, who did not intend to interfere in our distinct war. There is no adjudged case that comes up to this; and freight is refused from analogy to the general principle established by the British prize courts as to neutral interposition in the war. But an interference in the coasting and colonial, or other privileged trade of the enemy, and relief to him, is a *direct* assistance, and the rule cannot justly be extended to a remote and consequential aid not contemplated by the party. The license cases determined by this court, went on the ground of an adoption of the enemy character, and an incorporation with enemy interests; the case of the *Liverpool Packet*, determined by the same learned judge who tried this cause, shows the distinction | between this and the license cases.[2] The p. 387

[1] *Q. J. Pub. C.* 14. p. 111. of Du Ponceau's Translation.
[2] 1 *Gallison*, 513.

rule of the war of 1756, even supposing it to be well established, does not apply to the relative situation of Great Britain and the United States. The former had hung out no signals of depression and defeat in the peninsular war, and required no neutral aid as a relief from the pressure of her enemies.[1]

March 21st.

STORY, J., delivered the opinion of the court.

The single point now in controversy in this cause is, whether the ship is entitled to the freight for the voyage. The general rule that the neutral carrier of enemy's property is entitled to his freight, is now too firmly established to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying despatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted.[2]

p. 388 By the modern law of nations, provisions | are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination.[3] If destined for the ordinary use of life in the enemy's country they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.[4] Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir William Scott has observed, in such case the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities.[5] But it is argued that the doctrine of contraband cannot apply to the present case, because the destination was to a neutral country; and it is certainly true that goods destined for

[1] Vide 1 Wheaton, APPENDIX, note III.

[2] *Bynk. Quæst. J. Pub.* c. 14. 1 *Rob.* 237. The Sarah Christina. *Ib.* 288. The Haase. *Ib.* 296. The Emanuel. 2 *Rob.* 101. The Immanuel. *Ib.* 299. The Atlas. *Ib.* 104. The Rising Sun. 4 *Rob.* 169. The Maddona del Burso. 3 *Rob.* 295. The Neutralitat. 2 *Rob.* 128. The Welvart. 6 *Rob.* 420. The Friendship.

[3] 1 *Rob.* 189. The Jonge Margaretha. [4] *Ibid.* [5] *Ibid.*

the use of a neutral country can never be deemed contraband, whatever may be their character, or however well adapted to warlike purposes. But if such goods are destined for the direct | and avowed use of the p. 389
enemy's army or navy, we should be glad to see an authority which countenances this exemption from forfeiture, even though the property of a neutral. Suppose, in time of war, a British fleet were lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war thither, avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war, and an essential aid to the enemy in his hostile preparations? In such a case the goods, even if belonging to a neutral, would have had the taint of contraband in its most offensive character, on account of their destination; and the mere interposition of a neutral port would not protect them from forfeiture.[1] Strictly speaking, however, | this is not a question of contra- p. 390

[1] Articles which are exclusively useful for warlike purposes, are always contraband, when destined for the enemy; those of promiscuous use, in war and in peace, only become so under particular circumstances. *Grotius, de J. B. ac P.* l. 3. c. 1. s. 5. *Vattel*, l. 3. c. 7. s. 112. Among the latter class are included naval stores and provisions; though *Vattel* considers naval stores as always contraband, whilst he holds that provisions only become so under peculiar circumstances. 'Les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'ennemi s'appellent marchandises de contrabande. Telles sont les armes, les munitions de guerre, les bois, et tout ce qui sert à la construction, et à l'armément des vaisseaux de guerre, les chevaux, & *les vivres mêmes en certaines occasions, ou l'on espere de réduire l'ennemi par la faim.*' But *Bynkershoek* reasons against admitting into the list of contraband, articles of promiscuous use, and the materials out of which warlike articles are formed. 2 *J. Pub.* l. 1. c. 10. He, however, states that materials for building ships may be prohibited under certain circumstances. 'Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis ea quam maxime indigeat, et absque ea commode bellum gerere haud possit. Quum Ordines Generales in s. 2., edicti contra Lysitanos Dec. 31, 1657, iis, quae communi populorum usu *contrabanda* censentur, Lysitanos juvari vetuissent, specialiter addunt in s. 3. ejusdem edicti, quia nihil nisi mari a Lysitanos metuebant, ne quis etiam navium materiam iis advehere vellet, palam sic navium a *contrabandis* distincta, sed ob specialem rationem addita. Ob eandem causam navium materia conjungitur cum instrumentis belli in s. 2. d. Edicti contra Anglos Dec. 5. 1652, et in Edicto Ordinum Generalium contra Francos 9, Mart. 1689. Sed sunt hae exceptiones, quae regulam confirmant.' So also of provisions, they are not, in general, contraband; but if the produce of an enemy's country, and not destined for the ordinary sustenance of human life, but for military or naval use, they become contraband, according to the law of England. And articles, the growth of the neutral exporting country, are not contraband, though carried in the vessels of another country. 4 *Rob.* 161. The Appollo. And the benefit of the principle is extended to maritime countries exporting the produce of neighbouring interior districts, whose produce those countries are usually employed in exporting, in the ordinary course of their trade. *Ib.* 354. The Evert. But the law of France and Spain does not consider provisions as contraband. *Ordonnance de la Marine*, l. 3. tit. 9. *des Prises*, art. 11. *D'Habreu sobre las Presas*, part 1. c. 10., p. 136. And Valin states that, both by the law of France and the common law of nations, provisions are contraband only where destined to besieged or blockaded places. But he asserts that naval stores were contraband at the time he wrote, (1758,) and had been so since the beginning of that century, which they were not formerly. *Sur l'Ord. Ib.* Pothier, commenting on the same article of the ordinance, observes, 'A *l'égard* des munitions de bouche que des sujets des puissances neutres envoient à nos ennemies, elles ne sont point censées de contrabande, ni par conséquent sujettes confiscation; sauf dans un seul cas, qui est lorsqu'elles sont envoyées à une place assiégée ou bloquée.' *De Propriété*, no. 104. By the Swedish Ordinance of 1715, contraband articles are

band; for that can arise only when the property belongs to a neutral, |
p. 391 and here the property belonged to an enemy, and, therefore, was liable, at all events, to condemnation. But was the *voyage* lawful, and such as a neutral could, with good faith, and without a forfeiture, engage in? It has been solemnly adjudged that being engaged in the transport service, or in the conveyance of military persons in his employ, are acts of hostility which subject the property to confiscation.[1] And the carrying of despatches from the colony to the mother country of the enemy has subjected the party to the like penalty.[2] And in these cases, the fact that the voyage was to a neutral port was not thought to change the character of the transaction. The principle of these determinations was asserted to be that the party must be deemed to place himself in
p. 392 the service of the hostile state, and | assist in warding off the pressure of the war, or in favouring its offensive projects. Now, we cannot distinguish these cases, in principle, from that before the court. Here is a cargo of provisions exported from the enemy's country, with the avowed purpose of supplying the army of the enemy. Without this destination they would not have been permitted to be exported at all. Can a more important or essential service be performed in favour of the enemy? In what does it differ from the case of a transport in his service? The property, nominally, belongs to individuals, and is freighted, apparently, on private account, but, in reality, for public use, and under a public contract implied from the very permission of exportation. It is vain to contend that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy, indirectly, to operate with more vigour and promptitude against us, and increase his disposable force. But it is not the effect of the particular transaction that the law regards, it is the general tendency of such transactions to assist the military operations of the enemy, and the temptations which it presents to deviate from a strict neutrality. Nor do we

declared to be those 'qui peuvent être employées pour la guerre.' The Danish Ordinance of 1659 (provided for the subsisting war with Sweden) contains a long list of contraband articles, among which are included naval stores and provisions. The modern conventional law of nations has generally excluded provisions and naval stores from the list of contraband, and in all the treaties made by the United States since they were an independent power, except in the treaties with Great Britain, they are excluded; but the only treaty now subsisting which contains a definition of contraband, is that of 1795 with Spain, which embraces the munitions of war only. The treaty of 1794 with Great Britain, declares naval stores, with the exception of unwrought iron and fir planks, to be contraband, and liable to confiscation, and declares that when provisions and other articles, not generally contraband, shall become such according to the existing law of nations, they shall be entitled to pre-emption, with freight to the carrier. By the treaty negotiated in 1807, but not ratified, provisions were omitted in the list of contraband, and tar, and pitch (unless destined to a port of naval equipment) were added to the naval stores excepted in the treaty of 1794.

[1] 4 *Rob.* 256. The Carolina. 6 *Rob.* 420. The Friendship. *Ib.* 430. The Orozembo.
[2] 6 *Rob.* 440. The Atalanta. *Ib.* 461. The Constantia. Note.

perceive how the destination, to a neutral port, can vary the application of this rule; it is only doing that indirectly which is prohibited in direct courses. Would it be contended that a neutral might lawfully transport provisions for the British fleet and army while it lay at Bordeaux preparing for an expedition to the United States? Would it be contended that he might lawfully supply a British | fleet stationed on our coast? p. 393
We presume that two opinions could not be entertained on such questions; and yet, though the cases put are strong, we do not know that the assistance is more material than might be supplied under cover of a neutral destination like the present.

An attempt has been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the ground that the war of Great Britain against France was a war distinct from that against the United States; and that Swedish subjects had a perfect right to assist the British arms in respect to the former, though not to the latter. Whatever might be the right of the Swedish sovereign, acting under his own authority, we are of opinion that if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It is perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits are conferred upon an enemy, who thereby acquires a greater disposable force to bring into action against us. In the Friendship, (6 *Rob.* 420. 426.,) Sir W. Scott, speaking on this subject, declares, 'It signifies nothing whether the men, so conveyed, are to be put into action, on an immediate expedition, or not. The mere shifting of draughts in detachments, and *the conveyance of stores* from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant | whether this or that case may p. 394
be connected with the *immediate active* service of the enemy. In removing forces from distant settlements, there may be no intention of immediate action, but still the general importance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels.' It is obvious that the learned judge did not deem it material to what places the stores might be destined; and it must be equally immaterial what is the immediate occupation of the enemy's military force. That force is always hostile to us, be it where it may be. To-day it may act against France, to-morrow, against us; and the better its commissary department is supplied, the more life and activity is communicated to all its motions. It is not, therefore, in our view, material whether there be another distinct war in which our enemy is engaged, or not; it is sufficient that his armies are everywhere our

enemies, and every assistance offered to them must, directly, or indirectly, operate to our injury.

On the whole, the court are of opinion that the voyage, in which this vessel was engaged, was illicit, and inconsistent with the duties of neutrality, and that it is a very lenient administration of justice to confine the penalty to a mere denial of freight.[1] |

p. 395 MARSHALL, Ch. J. As a principle, which I think new, and which may certainly, in future, be very interesting to the United States, has been decided in this case, I trust I may be excused for stating the reasons which have prevented my concurring in the opinion that has been delivered.

In argument this sentence of the circuit court has been sustained on
p. 396 two grounds; 1st. That the exportation | of grain from Ireland is generally prohibited, and, therefore, that a neutral cannot lawfully engage in it during war. 2d. That the carriage of supplies to the army of the enemy is to take part with him in the war, and, consequently, to become the enemy of the United States so far as to forfeit the right to freight.

The first point has been maintained, on its supposed analogies to certain principles which have been, at different times, avowed by the great maritime and belligerant powers of Europe respecting the colonial and coasting trade, and which are generally known in England, and in this country, by the appellation of the rule of 1756. Without professing to give any opinion on the correctness of those principles, it is sufficient to observe that they do not appear to me to apply to this case. The rule of 1756 prohibits a neutral from engaging in time of war in a trade

[1] As to the penalty for the carrying of contraband, see 3 *Rob.* 182, note (*a.*) Freight and expenses are almost always refused by the British prize courts to a carrier of contraband. There is but one case in the books of an exception of this rule, which was of sail cloth carried to Amsterdam, the contraband being in a small quantity amongst a variety of other articles. 3 *Rob.* 91. The Neptunus. The penalty is carried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship, and innocent parts of the same cargo, 1st. Where the ship and the contraband articles belong to the same person. 1 *Rob.* 31. The Staadt Emden. *Ib.* 330. The Young Tobias. 2d. Where the cargo is carried with a false destination, false papers, or other circumstances of fraud. 3 *Rob.* 217. The Franklin. 4 *Rob.* 69. The Edward. 5 *Rob.* 290. The Richmond. 6 *Rob.* 125. The Ranger. 3d. Where the owner of the ship is bound, by the obligation of treaties between his own country and the capturing power, to refrain from carrying contraband to the enemy. 3 *Rob.* 295. The Neutralitet. By the ancient prize law of France, contraband goods were subject to pre-emption only. *Ordonnance de* 1584., art. 69. The ordinance of 1681, subjected the contraband articles only to confiscation; but by the regulation of 1778, the same penalty was extended to the ship, in case three fourths of the cargo consisted of contraband articles. The law of Holland confiscates the contraband articles only, but refuses freight; the principle of which is vindicated by *Bynkershoek.* 'Idque longe verissimum est, nam mercedes non debentur, nisi itinere perfecto, et, ne perficeretur, hostis jure prohibuit. Deinde publicantur *contrabanda* velex delicto, et ita nihil commiserunt navarchi, quam ipsi mercium vetitarum domini, vel, quod magis est, ex re, ex ipsa nimirum transvectione; quamois enim amico nostro non possimus commercio interdicere cum hoste nostro, possumus tamen prohibere, ne in bello illi prosit in necem nostram. Atque ita, quod publicatur, publicabitur citra ullum ullius hominis respectum, et habebitur, ac si divina periisset, extincto sic jure pignoris.'

in which he was prevented from participating in time of peace, because that trade was, by law, exclusively reserved for the vessels of the hostile state. This prohibition stands upon two grounds. 1st. That a trade, such as the coasting or colonial trade, which, by the permanent policy of a nation, is reserved for its own vessels, if opened to neutrals during war, must be opened under the pressure of the arms of the enemy, and in order to obtain relief from that pressure. The neutral who interposes to relieve the belligerant under such circumstances, rescues him from the condition to which the arms of his enemy has reduced him, restores to him those resources which have been wrested from him by the | arms p. 397
of his adversary, and deprives that adversary of the advantages which successful war has given him. This the opposing belligerant pronounces a departure from neutrality, and an interference in the war to his prejudice, which he will not tolerate. 2d. If the trade be not opened by law, that a neutral employed in a trade thus reserved by the enemy, to his own vessels, identifies himself with that enemy, and by performing functions exclusively appertaining to the enemy character, assumes that character. Neither the one nor the other of these reasons applies to the case under consideration. The trade was not a trade confined to British vessels during peace, and opened to neutrals during war under the pressure created by the arms of the enemy. It was prohibited for political reasons, entirely unconnected with the interests of navigation, and thrown open from motives equally unconnected with maritime strength. Neither did the neutral employed in it engage in a trade then, or at any time, reserved for British vessels, and, therefore, did not identify himself with them. He was not performing functions exclusively appertaining to the enemy, and, consequently, in performing them did not assume that character.

The second point presents a question of much more difficulty. That a neutral carrying supplies to the army of the enemy does, under the mildest interpretation of international law, expose himself to the loss of freight, is a proposition too well settled to be controverted. That it is a general rule, admitting of few, if any, exceptions, is not denied by the counsel | for the appellants. But they contend that this case is p. 398
withdrawn from that rule by its peculiar circumstances. The late war between the United States and Great Britain was declared at a time when all Europe, including our enemy, was engaged in a war with which ours had no connexion, and in which we professed to take no interest. The allies of our enemy, engaged with him in a common war, the most tremendous and the most vitally interesting to the parties that has ever desolated the earth, were our friends. We kept up with them the mutual interchange of good offices, and declared our determination to stand aloof from that cause which was common to them and Great Britain.

They, too, considered this war as entirely distinct from that in which they were engaged. Although at a most critical period we had attacked their ally, they did not view it as an act of hostility to them. They did not ascribe it to a wish to affect, in any manner, the war in Europe, but solely to the desire of asserting our violated rights. They seemed almost to consider the Britain who was our enemy, as a different nation from that Britain who was their ally.

How long this extraordinary state of things might have continued it is impossible to say; but it certainly existed when the Commercen was captured. What its effect on that capture ought to be, must depend more on principle than on precedent. It has been said, and truly said, by the counsel for the captors, that we were at war with Great Britain in every part of the world. We were enemies everywhere. Her troops
p. 399 in Spain, or elsewhere, as | well as her troops in America, were our enemies. It was a conflict of nation against nation. This is conceded; and, therefore, the cargo of the Commercen, being British property, was condemned as prize of war. But, although this must be conceded, the corollary which is drawn from it, that those who furnish their armies in Spain with provisions, aid them to our prejudice, and, therefore, take part in the war, and are guilty of unneutral conduct, must be examined before it can be admitted. It is not true that every species of aid given to an enemy is an act of hostility which will justify our treating him who gives it, or his vessels, as hostile to us. The history of all Europe, and especially of Switzerland, furnishes many examples of the truth of this proposition. Those examples need not be quoted particularly, because they stand on principles not entirely applicable to this case. It is the peculiarity of this war which requires the adoption of rules peculiar to a new state of things, in adopting which we must examine the principle on which a nation is justified in treating a neutral as an enemy. That a neutral is friendly to our enemy, and continues to interchange good offices with him, can furnish no subject of complaint; for, then, all commerce with one belligerant would be deemed hostile by the other. The effect of commerce is to augment his resources, and enable him the longer to prosecute the war; but this augmentation is produced by an act entirely innocent on the part of the neutral, and manifesting no hostility to the opposing belligerant. It cannot, therefore, be molested
p. 400 by him while the same good offices | are allowed to him, although he may not be enabled to avail himself of them to an equal degree. It would seem, then, that a remote and consequential effect of an act is not sufficient to give it a hostile character; its tendency to aid the enemy in the war must be direct and immediate. It is also necessary that it should be injurious to us; for a mere benefit to another, which is not injurious to us, cannot convert a friend into an enemy.

If these principles be correct, and they are believed to be so, let us apply them to the present case. When hostilities commenced between the United States and Great Britain, that country was carrying on a war with France, in which the great powers of Europe were combined. We did not expect, and certainly had no right to expect, that our declaration of war against one of the allies would, in any manner, affect the operations of their common war in Europe. The armies of Portugal and Spain were united to those of Britain, and unquestionably aided and assisted our enemy, but they did not aid and assist him against us, and, therefore, did not become our enemies. Had any other of the combined powers equipped a military expedition for the purpose of reinforcing the armies of Britain in any part of Europe, or had a new ally engaged in the war, that would have been no act of hostility against the United States, although it would have aided our enemy. But if a military expedition to the United States had been undertaken, the case would have assumed a different aspect. Such expedition would be hostile to this country, and the power undertaking it would | become our p. 401
enemy. It would have been an interference operating directly to our prejudice. The declaration of war against Great Britain had, without doubt, a remote and consequential effect on the war in Europe. The force employed against the United States must be subducted from that employed in support of the common cause in Europe, or greater exertions must be made which might sooner exhaust those resources which enabled her to continue her gigantic efforts in their common war. Consequently, the declaration of war by the United States remotely affected the war in Europe, to the advantage of one party and the injury of the other. Yet no one of the allies considered this declaration as taking part in that war, and placing America in the condition of an enemy. But, had the United States employed their force on the peninsula against the British troops, or had they interfered in the operations of the common war, it may well be doubted whether they might not have been rightfully considered as taking part against the allies, and arranging themselves on the side of the common enemy.

In answer to arguments of this tendency, made at the bar, it was said that nations are governed by political considerations, and may choose rather to overlook conduct at which they might justly take offence, than unnecessarily to increase the number of their enemies, or provoke increased hostility; but that courts of justice are bound by the law, and must inflexibly adhere to its mandate. While this is conceded, it is deemed equally true that those acts which will justify the condemnation of a neutral | as an enemy, would also justify the treating p. 402
his nation as an enemy, if they were performed or defended by the nation. There is a tacit compact that the hostile act of the individual

shall not be ascribed to his government; and that in turn, the government will not protect the individual from being treated as an enemy. But if the government adopts the act of the individual, and supports it by force, the government itself may be rightfully treated as hostile. Thus contraband of war, though belonging to a neutral, is condemned as the property of an enemy, and his government takes no offence at it; but should his government adopt the act, and insist upon the right to carry articles deemed contraband, and support that right, it would furnish just ground of war. The belligerant might choose to overlook this hostile act, but the act would be, in its nature, hostile. The inquiry, then, whether the act in which this individual Swede was employed, would, if performed by his government, have been considered an act of hostility to the United States, and might rightfully be so considered, is material to the decision of the question, whether the act of the individual is to be treated as hostile. Great Britain and Sweden were allies in the war against France. Consequently, the king of Sweden might have ordered his troops to co-operate with those of Britain, in any place, against the common enemy. He might have ordered a reinforcement to the British army on the peninsula, and this reinforcement might have been transported by sea. An attempt on the part of the United States
p. 403 to intercept it, because it was | aiding their enemy, would certainly have been an interference in the war in Europe which would have provoked, and would have justified, the resentment of all the allied powers. It would have been an interference not to be justified by our war with Britain, because those troops were not to be employed against us. If, instead of a reinforcement of men, a supply of provisions were to be furnished in that part of the allied army which was British, would that alter the case? Could an American squadron intercept a convoy of provisions, or of military stores, of any description, going to an army engaged in a war common to Great Britain and Sweden, and not against the United States? Could this be done without interfering in that war, and taking part in it against all the allies. If it could not, then any supplies furnished by the government of Sweden, promoting the operations of their common war, whether intended for the British or any other division of the allied armies, had a right to pass unmolested by American cruisers. It is not believed that any act which, if performed by the government, would not be deemed an act of hostility, is to be so deemed if performed by an individual. Had the provisions then on board the Commercen been Swedish property, the result of this reasoning is that it would not have been confiscated as prize of war. Being British property, it is confiscable; but the Swede is guilty of no other offence than carrying enemy's property, an offence not enhanced in this particular case by the character of that property. He is, therefore, as much entitled
p. 404 to freight as if his cargo had been | of a different description. His trade

was not more illicit than the carriage of enemy's goods for common use would have been.

If the cases in which neutrals have been condemned for having on board articles, the transportation of which clothe them with the enemy character, be attentively considered, it is believed that they will not be found to contravene the reasoning which has been urged. To carry despatches to the government has been considered as an act of such complete hostility, as to communicate the hostile character to the vessel carrying them. But this decision was made in a case where the despatches could only relate to the war between the government of the captors, and that to which the despatches were addressed. They were communications between a colonial government, in danger of being attacked, and the mother country. In a subsequent case, it was determined that a neutral vessel might bear despatches to a hostile government without assuming the belligerant character, if they were from an ambassador residing in the neutral state. Yet such despatches might contain intelligence material to the war. But this is a case in which the belligerant right to intercept all communications addressed to the enemy, by the officers of that enemy, is modified and restrained by the neutral right to protect the diplomatic communications which are necessary to the political intercourse between belligerants and neutrals. It is a case in which the right of the belligerant is narrowed and controlled by the positive rights of a neutral; still more reasonably may they | be narrowed p. 405
and controlled by the positive rights of a belligerent engaged in a war in which we have no concern, and in which we ought not to interfere. To transport troops, or military persons, belonging to the enemy, from one place to another, has, also, been determined to subject the vessel to condemnation; but, in those cases, the service in which it was supposed the persons, so conveyed, were to be employed, was against the government of the captors. The transportation of these persons was to aid the views of one belligerant against the other, and was, therefore, to take part in the war against that other. It is an act, the operation of which is direct and immediate.

It may be said that this reasoning would go to the protection of British troops passing to the peninsula, and of British supplies transported in British vessels for their use; that it therefore proves too much, and must, consequently, be unsound.

It is admitted that, pressed to its extreme point, the argument would go this extent, an extent which cannot be maintained; but it does not follow that it is unsound in every stage of its progress. In every case of conflicting rights, each must yield something to the other. The pretensions of neither party can be carried to the extreme. They meet—they check—they limit each other. The precise line which neither can pass, but to which each may advance, is not easily to be found and

marked; yet such a line must exist, whatever may be the difficulty of discerning it. To attack an enemy, or to take his property, if either
p. 406 can be done without violating the sovereignty | of a friend, is of the very essence of war. None can be offended at the exercise of this right, who may not be offended at the declaration of war itself. The injury which the allies of our enemy, in a war common to them, (but in which we are not engaged,) sustain, by this occasional interruption, is incidental, while, on our part, it is the exercise of a direct and essential right. But when we attack a friend who is carrying on military operations conjointly with our enemy, but not against us, we are not making direct war, but are using those *incidental* rights which war gives us, against those *direct* rights which are exercised by a belligerant not our enemy, and which constitute war itself. In either case it would seem to me that the incidental must yield to the direct and essential right.

Upon this view of the subject, I have at length, not, it is confessed, without difficulty, come to the conclusion, that the Commercen, being a Swedish vessel, whose nation was engaged in a war, common to Great Britain and Sweden, against France, and to which the United States were not a party, might convey military stores for the use of the British armies engaged in that war, as innocently as she could carry British property of any other description, and is, therefore, as much entitled to freight as she would be had the property belonged to the enemy, but been destined for ordinary use.

Livingston, J. I concur in the opinion of the Chief Justice. Considering Sweden an ally of Great Britain, in the war which the latter
p. 407 was carrying on | in the peninsula, either the king of Sweden himself might send transports with provisions for the use of the British army, while engaged in any common enterprise, or his subjects might lawfully aid in such transportation, without a violation of their neutral character as it regarded the United States. If the American government had asserted the right of capturing and condemning Swedish vessels, or depriving them of their freight, on the ground on which it has been denied to the Commercen, I am not certain that Sweden would not have thought it a very serious aggression, and would not have had a right to consider it, if persisted in, as an act of hostility.

Johnson, J. I also concur in the opinion of the Chief Justice; and I do it without the least doubt or hesitation. Sweden was an ally in the war going on in the peninsula, and her subjects had an indubitable right to transport provisions in aid of their nation, or its allies. The owner, therefore, had a right to his freight; for he did no act inconsistent with our belligerant rights, while in the direct and ordinary exercise of those rights which a state of war conferred on himself.

Sentence of the circuit court affirmed.

The George, The Bothnea, and The Janstaff.

(1 Wheaton, 408) 1816.

In cases of joint or collusive capture, the usual simplicity of the prize proceedings is necessarily departed from; and where, in these cases, there is the least doubt, other evidence than that arising from the captured vessel, or invoked from other prize causes, may be resorted to.

APPEAL from the circuit court for the district of Massachusetts.

These were British vessels captured and brought in by the private armed vessels the Fly and the Washington, and libelled as prize of war. In each of them the United States interposed a claim, charging that the capture was collusive, and that the whole property ought, on that account, to be forfeited to the United States. In each case the captors applied for permission to make farther proof. In that of the *George*, it was allowed in the district court, and partially received; but the application to make still further proof, and to introduce into the record testimony already taken, was rejected in the circuit court, and was again offered in this court. In the two last cases farther proof was refused, both in the district and circuit courts. In all the cases, the vessels and cargoes were condemned to the United States, and from each of these sentences of condemnation the captors appealed to this court. |

The first case was argued by *Dexter* and *G. Sullivan*, for the appellants p. 409
and captors, and by the attorney-general, for the United States. The two last by *Winder* and *Harper*, for the appellants and captors, and by *Dexter* and *Pinkney*, for the United States.

MARSHALL, Ch. J., delivered the opinion of the court as follows:

The first question to be discussed is, the propriety of allowing farther proof. It is certainly a general rule in prize causes that the decision should be prompt; and should be made, unless some good reason for departing from it exist, on the papers and testimony afforded by the captured vessel, or which can be invoked from the papers of other vessels in possession of the court. This rule ought to be held sacred in that whole description of causes to which the reasons on which it is founded are applicable. The usual controversy in prize causes is between the captors and captured. If the captured vessel be plainly an enemy, immediate condemnation is certain and proper. But the vessel and cargo may be neutral, and may be captured on suspicion. This is a grievous vexation to the neutral, which ought not to be increased by prolonging his detention, in the hope that something may be discovered from some other source, which may justify condemnation. If his papers are all clear, and if the examinations *in preparatorio* all show his neutrality, he is, and ought to be, immediately discharged. In a fair transaction this will often be the case. If any thing suspicious appears in the papers,

p. 410 which involves the neutrality of the claimant | in doubt, he must blame himself for the circumstance, and cannot complain of the delay which is necessary for the removal of those doubts. The whole proceedings are calculated for the trial of the question of prize or no prize, and the standing interrogatories on which the preparatory examinations are taken are framed for the purpose of eliciting the truth on that question. They are intended for the controversy between the captors and the captured; intended to draw forth every thing within the knowledge of the crew of the prize, but cannot be intended to procure testimony respecting facts not within their knowledge. When the question of prize or no prize is decided in the affirmative, the strong motives for an immediate sentence lose somewhat of their force, and the point to which the testimony *in preparatorio* is taken, is no longer the question in controversy. If another question arises, for instance, as to the proportions in which the owners and crew of the capturing vessel are entitled, the testimony which will decide this question must be searched for, not among the papers of the prize vessel, or the depositions of her crew, but elsewhere, and liberty must, therefore, be given to adduce this testimony. The case of a joint capture has been mentioned, and we think, correctly, as an analogous case. Where several cruisers claim a share of the prize, extrinsic testimony is admitted to establish their rights. They are not, and ought not to be, confined to the testimony which may be extracted from the crew. And yet the standing interrogatories are, in some degree, adapted to this case. Each individual of the crew is always asked |
p. 411 whether, at the time of capture, any other vessel was in sight. Notwithstanding this, the claimants to a joint interest in the prize, are always permitted to adduce testimony drawn from other sources to establish their claim. The case before the court is one of much greater strength. The captors are charged with direct and positive fraud, which is to strip them of rights claimed under their commissions. Even if exculpatory testimony could be expected from the prize crew, the interrogatories are not calculated to draw it from them. Of course, it will rarely happen that testimony taken for the sole purpose of deciding the question whether the captured vessel ought to be condemned or restored, should furnish sufficient lights for determining whether the capture has been *bona fide* or collusive. If circumstances of doubtful appearance occur, justice requires that an opportunity to explain those circumstances should be given; and that fraud should never be fixed on an individual until he has been allowed to clear himself from the imputation, if in his power.

Under these impressions, the case must be a strong one, indeed; the collusiveness of the capture must be almost confessed, before the court could think a refusal to allow other proof than is furnished by the captured

vessel justifiable. In the cases before the court there are certainly many circumstances of great suspicion, but none which do not admit of explanation.

In the case of the *George*, captured by the privateer Fly, the circumstances relied on to prove the collusiveness of the capture are, |

1st. The force of the Fly. 2d. The shipping articles. 3d. The cargo p. 412
of the George. 4th. The number of her crew. 5th. The place, and other circumstances of her capture. 6th. The sending the mariners on shore, instead of bringing them into the United States.

First. The force of the Fly may probably neither require nor admit of explanation.

Second. The shipping articles unquestionably furnish ground of suspicion. But some light may be thrown on this point by testimony showing whether it was, or was not, common for small cruisers in the bay of Fundy to give wages to the crew instead of prize money. It may be of still more importance to determine whether each of the crew, like Gilley, who was examined, was to receive twenty dollars in addition to his wages, for each prize.

Third. Respecting the cargo it is not probable that farther testimony can be adduced.

Fourth. Respecting the number of mariners on board the captured vessel the court would require some further information. On the one part it is asserted that they are insufficient, and on the other that they are sufficient for the alleged voyage. There is no evidence which can incline the court the one way or the other.

Fifth. On the place and other circumstances of capture further information may certainly be given. The George appears to have sailed from St. Johns, New Brunswick, for the Havanna, on the 8th, and to have been captured in Long-Island harbour, at anchor, on the 13th of January, 1814. The distance | between these places is said to be five p. 413
hours' sail, with a favourable wind and tide. Where did she linger during this interval? Was she in Etang harbour during any part of the time? Why did she leave that harbour? Did she expect a convoy? Did a convoy sail about that time? Was it usual for vessels to wait for a convoy at the island of Grand Menan? Could a vessel be descried from the sea lying at anchor in Long Island harbour? Satisfactory answers to these questions might certainly throw some light on this part of the case, and better enable the court to form an opinion on it.

Sixth. It may not, perhaps, be easy to account for not bringing in the crew. Yet it would contribute, in some degree, to the elucidation of the transaction, if the practice in that part of the country could be laid before the court. It might also be of some importance to know whether the sum of 100 dollars was usually paid by government for

every merchant seaman brought into the country, whether he was a British subject or the subject of a neutral power.

In the cases of the *Janstaff* and the *Bothnea,* there are some points to be explained which are common to those cases with the George, and some which are peculiar to themselves.

Of the latter class are the inquiries,

First. Whether it frequently happened that unarmed vessels, without a convoy, sailed from that port, either for New London, or for any other port of the United States, or for a foreign port ? |

p. 414 Second. What is the character, and what the occupation, of the two passengers who were found, one on board the Bothnea, and the other on board the Janstaff ? Are they acquainted with the coasts in, or about, Long-Island sound ? Are they capable of being supercargoes ? How came they at Halifax ?

In both cases it will be desirable to know, whether any previous acquaintance existed between the captors and the owners of the captured vessels, and whether the captors had had any previous communication with the places from which the captured vessels sailed. In the cases of the Janstaff and Bothnea, all the circumstances attending the capture will be important. If, as is not expected, any farther or better reason can be given for putting the whole crew on shore, it may throw some light on the cases. Each case depends, in some degree, on the points which have been suggested. They are stated for the purpose of showing, that points, on which the judgment of the court may, in some degree, depend, are susceptible of explanation, and, therefore, ought to be explained so far as it may be in the power of the parties to explain them. It is not, however, intended to confine them to the particular points which have been stated. Full liberty is given to both parties to adduce farther proof on every point in the case.

Farther proof ordered.

The St. Nicholas.—Meyer et al. claimants.

(1 Wheaton, 417) 1816.

A question of proprietary interest.

Where enemy's property is fraudulently blended in the same claim with neutral property, the latter is liable to share the fate of the former.

Appeal from the circuit court of Georgia. This vessel and the cargo were libelled as prize of war. The ship was claimed by John E. Smith, the supercargo, in behalf of John Meyer, alleged to be a Russian subject residing at St. Petersburg. The cargo consisted of logwood and cotton, 200 bales of which were claimed by Smith, in behalf of Platzman & Gosler, also alleged to be Russian merchants of St. Petersburg. The

remainder of the cargo, consisting of 950 bales of cotton, and 58 tons of logwood, were | claimed in behalf of John Inerarity, a Scotchman, p. 418
domiciled at Pensacola, and an adopted Spanish subject. The vessel was restored in the district court, and the cargo condemned, except the logwood, which was restored. Both parties appealed to the circuit court, and the cause was then heard and considered; but that court, under the influence of personal considerations, rendered only a *pro forma* decree, affirming the sentence of the district court, at the same time expressing a strong opinion that both vessel and cargo were liable to condemnation. The cause had been continued at the last term of this court for farther proof, but no farther proof was produced at the present term.

The cause was argued by *Key* and *Harper*, for the appellants and claimants, and by *Pinkney* and *Charleton*, for the respondents and captors.

March 21st.

JOHNSON, J., delivered the opinion of the court as follows:

This case presents itself in this court under a cloud of circumstances unusually threatening. There is scarcely wanting in it one of those characteristics by which courts of admiralty are led to the detection of neutral fraud. Whether we consider the persons who conduct the voyage, the original character of the vessel, the time and circumstances of the transfer, the trade she has since been engaged in, the funds with which that trade has been transacted, or the manner in which it has been conducted, we find all the hopes and wishes of the adventure centering | in the hostile country. La French, the master, is a native Dane, a p. 419
naturalized American citizen, a Russian subject, and, finally, domiciled and his family residing in Great Britain, but (as he declares himself) having no particular residence. Smith, the supercargo, is a native Englishman, but a naturalized citizen of the United States. He has resided near 30 years in Baltimore, where the war finds him. He sails for Lisbon; from thence to Great Britain; and is almost immediately, without showing any pretensions to such credit, employed by an opulent house of trade to take charge of this adventure, with a latitude of discretion which could be the result only of long acquaintance, or very strong recommendations. Such men are the proper instruments of belligerant or neutral fraud; they are the avowed panders of the mercantile world; their consciences are in the market. Having no national character or feeling, and but very few qualms of any other kind, their talents and fidelity to their employers, like those of the bravo, are sought out by the projectors of iniquitous adventure. And who are Meyer, and Platzman & Gosler? They are introduced in the bills of the day as very important personages; the one was the owner of the ship, the other of the cargo; but we find them acting a part conspicuous

only for its insignificance. They cross the stage, and disappear. It is a circumstance which scarcely admits of explanation, that Meyer never exercised a single act of ownership over this vessel. He resides at St. Petersburg, she is lying at Cronstadt. He purchases her, for aught
p. 420 we know, without having ever seen | her, of a person whom nobody knows, and whom nothing connects with the vessel; is introduced by a Mr. Nicholas, of Virginia, to the master, leaves him in command, and, from that time to the present, does not give him one order, nor writes a single letter to him. If we could suppose it possible, that there was no correspondence between them from the 31st of July, 1812, when the ship was purchased, to the 22d December, when she was chartered to Platzman & Gosler, at least he would have written at that time and enclosed the master a copy of the charter-party, and a letter of instructions to regulate his conduct in the distant and perilous voyage on which he was about to enter. But we find La French without one scrap of instruction from the supposed owner, and, in all things, yielding implicit obedience to the supposed agent of Platzman & Gosler, whose interests might very well have been in many things inconsistent with those of the charterer. And what is not less remarkable, although he acknowledges that he must have been eighteen months or two years master of the same ship prior to the sale to Meyer, we find nothing about him or the vessel by which we can discover who the former owner was, and when he is asked who executed the bill of sale to Meyer, his reply is, he does not know; thus leading, fairly, to a conclusion, that reasons exist now, and existed formerly, for rendering such a correspondence either unnecessary or unsafe to accompany the ship. As to Platzman & Gosler, the same observation is strikingly applicable to them. From the moment they launch their bark upon the ocean, she becomes, as to
p. 421 them, | a perfect derelict. Not one anxious inquiry, not one expression of feeling, is communicated by letter to their agent in London. Such, at least, we have a right to infer from the non-production of any such correspondence upon the order for farther proof. And, upon the supposition of the fairness of this transaction, the existence of letters to prove it fair, was unavoidable; for the letter of the 22d December, expressly calls for correspondence prior to that date, and having relation to this adventure. Beside that, as difficulties thickened upon the adventure in Pensacola, bills on bills were drawn upon the British house, and letters on letters sent under cover to them, it would have followed that communications would be made to the Russian house, and bills drawn for reimbursement. But over all this there rests an ominous silence.

Nor is there any intrinsic skill in the machinery of this transaction. It can neither claim the praise of genius in its invention, nor of skilful

execution in the adaptation of its parts. The very inception of it is laid in a bungling artifice that would not cheat a novice in the arts of commercial evasion. It bears, on the face of it, the record of its own conviction, and confesses itself to be, what it was intended to be, nothing but a neutral cloak. The correspondents, Simpson & Co., to whom the letter of the 22d of December is addressed, are expressly instructed to attach that letter to the invoice and bill of lading, in order to support the Russian national character. This, of itself, is conclusive to show that this evidence constituted no part of the mercantile transaction | between p. 422
the parties. For, when was it ever heard of that a letter, which contains in it the whole evidence upon which a correspondent purchases, advances, and negotiates to a great amount, is thus to be thrown to the winds, or returned to the hands of him who is interested in suppressing it? And every step that we advance in the progress of this transaction, we find new light breaking in upon us to make manifest its real characteristics. The letter itself, in which the whole adventure originates, bears, on the face of it, obvious symptoms of that over anxiety which never fails to accompany a conscience ill at ease. In a letter to a man, to whom such facts must have been wholly indifferent, it brings together, into one view, a number of facts to which the English merchants (at least) know that courts of admiralty are in the habit of attaching importance in deciding on questions of fraud or belligerant rights; as, for instance, to show that the ship had been previously engaged in neutral trade, they say, 'After the discharge of a cargo of Russian produce at this port.' And that it may appear that this adventure had not recently originated, they say, 'Our friends, Messrs. A. Glennie, Son & Co., with whom we have some time corresponded on this subject,' &c. This letter, which is all-important to the decision of the cause, calls forth some more remarks. It contains a singular congeries of powers, instructions, and facts. It is the only evidence we have that the vessel ever was chartered for this voyage. The only article of instructions to Meyer is to be found here; the only evidence of the right of A. Glennie & Co. | to act for Platzman & Gosler, is contained in it. Nor is there any thing p. 423
else that would have directed the house of Simpson & Co. in their transactions, had that house been in existence when the vessel arrived at Pensacola. It may well be asked, would A. Glennie & Co. have been satisfied to part with so important a voucher for their transactions as agents in this large adventure, had there been any thing real in it? Or would so many persons have been satisfied to stake their fortunes on this itinerant document, which was to give its light and pass on, perhaps never to return again? But if it did not bear upon the face of it such palpable marks of its fictitious character, the conduct of the several persons who affected to be governed by it, would sufficiently show

that it was a paper of no authority. It is to be remarked that on some points this letter of the 22d of December, in which alone Platzman & Gosler appear in a tangible form, is explicit and positive. On others, it yields unbounded discretion to A. Glennie & Co. to instruct Simpson & Co., to whom it is directed, in his conduct in that agency. With regard to two things, it yields no discretion. First, as to the article which is to be purchased, which is expressly limited to cotton. Secondly, as to the homeward destination of the ship and cargo, which is exclusively to Gottenburgh. Yet we find that on the 22d of February, and the 3d of March, 1813, A. Glennie & Co. give Smith instructions authorizing a deviation from the orders of their principal, not only as to the articles of which the cargo might consist, but as to the voyage from New-Orleans, |
p. 424 empowering him even to charter the vessel, and limiting him in the purchase of cotton to the price of eight cents, when Platzman & Gosler prescribe no limits, and, in fine, taking the power, both as to vessel and cargo, out of the hands of Simpson & Co., to whom the letter of Platzman & Gosler is directed, and placing the adventure altogether under the control of Smith, a man whom they appoint, for aught we know, without any authority from their principal, and whose presence was altogether unnecessary, under the supposition that Platzman & Gosler had really addressed themselves to Simpson & Co., to load the vessel on their account. But this is not all; in every step of this transaction, the parties betray a consciousness of the necessity of artifice, and in every attempt to resort to it, betray more of a disposition, than a talent, for fraud. Well aware that it is necessary to keep up a correspondence with the supposed neutral, Smith resorts to a method in which he supposes he may covertly correspond with the English house, while he keeps up the appearance of corresponding with the neutral claimant. We find a most minute detail of all his transactions, and the events of the voyage contained in a series of letters directed to Platzman & Gosler, but uniformly transmitted open, and under cover to the persons really to be informed—the hostile house. This is a shallow artifice. The belligerant must be fatuous who could be duped by it. And, unfortunately for the claimants, the letters, on the face of them, contain evidence to prove
p. 425 for whom they were really intended. Strike out the names of | Platzman & Gosler, and insert that of A. Glennie & Co., and they will be found to be written with a view to satisfy several passages in his general letter of instructions, of the 2d of February, from A. Glennie & Co.

This affected correspondence with Platzman & Gosler commences on the 24th of May, 1813, and in the letter of that date, and that of the 5th of June following, there are very striking proofs of the nature and views of that correspondence. In the letter of the 25th of December, 1813, which may be called the magna charta of this adventure, it will

be recollected Platzman & Gosler are made to say, that as they live in so remote a place as St. Petersburg, Simpson must receive his instructions about the cargo of cotton altogether from A. Glennie & Co.; and in the letters of the 2d of February and 5th of March, above referred to, Smith receives his instructions altogether from A. Glennie & Co., and yet when he writes to Platzman & Gosler on the 24th of May, and announces his intended voyage to Liverpool, (in express violation of their orders,) he adds, 'There I shall hope to receive your instructions about the disposal of the cargo.' This to the London house of A. Glennie & Co. was perfectly intelligible. It will also be recollected, that in the letters from A. Glennie & Co. of the 2d of February, Smith is expressly instructed to communicate all necessary information, so as to govern them in making insurance; and yet in these letters to Platzman & Gosler he affectedly observes, that he sends them open to A. Glennie & Co., in order to direct their conduct | in case Platzman & Gosler should have p. 426
instructed them to make insurance. When to all these considerations we add, that this adventure, in fact, originates in a hostile country, and never appears to look to any other termination, and that the funds on which it was projected were altogether English, we are satisfied that the ship, and the 200 bales of cotton, laden professedly on account of Platzman & Gosler, are not owned as claimed. With regard to the ship some additional reasons might be urged; but the foregoing, as applying to that whole claim, we deem sufficient.

With regard to the claim of Inerarity, the question there rests between positive swearing and irreconcilable circumstances. And it is a melancholy truth, that forces itself upon the observation of every one who is conversant with courts of admiralty, that positive oaths are too often the most unsatisfactory evidence that can be resorted to. A species of casuistry or moral sophistry seems to have acquired too great an ascendancy over the witnesses who sometimes appear in those courts.

With regard to the logwood, nothing can be said against it, except that we find it in bad company. There is no evidence in the case which can induce a belief that it belonged to any one but Inerarity. Not so with the cotton; except in his own oath, and in the invoice, he is no where recognised, among the acting parties, as owner of this cargo. The evidence of an invoice on such a subject is literally reduced to nothing in the prize courts; and his own affidavit will be considered in due time. We will inquire into | the circumstances which involve him in p. 427
suspicion, and see how these circumstances are explained.

It is in evidence that on the arrival of Smith at Pensacola, and his ascertaining the impracticability of loading the ship on account of his owners, at the limited price, Inerarity himself advised him, as he says, in his letter of the 24th of May, to go to New-Orleans for the purpose

of endeavouring to obtain freight. From this it is evident that at that time he had no intention to embark in a shipment of cotton. The opportunity of securing this vessel at such a time would otherwise have been eagerly caught at. On going to New-Orleans Smith falls in with Milne, who finally ships the whole of this parcel of cotton through Inerarity.

The bills of lading and invoice are made out to Inerarity, but Milne transmits the cotton to him, not generally, but expressly to be laden on board this ship. In all this transaction, Milne is the real *dux facti*. He procures the cargo, for which Smith pays him a commission ; he transmits the cotton ; Inerarity never appears but as the agent of Milne. And when Smith speaks of the shipper, which he often does in his letters to La French, he speaks of him as Inerarity's friend.

But it is contended that, by this expression, we are to understand Inerarity himself ; that he was the neutral Spaniard spoken of as the shipper in Smith's letters to Platzman & Gosler, and as no other shipper appears in the case but Inerarity's friend, and Inerarity himself, they must mean the same person. This idea is ingeniously taken up from an
p. 428 expression | in Smith's answer of the 12th October, to Inerarity's letter of the 6th, relative to the damage done to the cotton by water. In which letter Smith says, ' As a shipper on board the St. Nicholas, my wish is to give you every satisfaction,' &c. And in several of the letters to Platzman & Gosler, he speaks of the shipper as a Spaniard and neutral. But as it was evidently a part of the original arrangement, that this cotton should be shipped in the name of Inerarity, who was a neutral Spaniard, the expressions, in both those letters, are satisfied by this consideration. And if we then take Milne, as Inerarity styles him, in the letter of October the 6th, ' his friend ' at New-Orleans, every thing becomes intelligible. *Inerarity* is the neutral Spaniard in whose name the cotton is shipped, and *Milne* his friend at New-Orleans, with whom Smith makes his agreement about taking the cotton. It is to be remarked, that the letter of Inerarity of the 6th of October, and Smith's answer, and the letters of Smith to Platzman & Gosler, were intended to see the light. The two former as the inception of, or the ground of defence to, a legal investigation ; the latter, if necessary, to prove a legal character. It was necessary, therefore, for all the characters to assume their respective disguises. No one can believe, that when Smith was at New-Orleans urging the shipment of the cargo, every day making some new arrangement with the shipper, and writing to La French, in consequence of those agreements, to receive certain quantities of cotton from Inerarity, then at Pensacola, that he could have confounded Inerarity and his
p. 429 friend so very often | as he does, at the same moment when he is distinguishing them, not only in words, but in acts. Another circumstance, attaching no small suspicion to this claim, is the connexion which the

evidence makes out between the shipment by Milne and one Ralston, who appears on the stage about the time when the vessel first sailed. We do not mean here to attach any importance to the evidence of Dayton. It was utterly disregarded in the court below, and meets with the same fate here. We do not consider it at all necessary to the case. But that Ralston was the person for whom Smith requests La French to provide as a passenger, and an only passenger, is proved by the fact of his being the only passenger on board when the vessel sailed. This person, Smith says, was to have charge of the invoices; and this person must be presumed to have been an American, as we find him at large in the country in a time of war. Whether American or Englishman, is immaterial to the decision of this court. Smith swears, indeed, that he had no connexion with the cargo; but Smith himself furnishes the evidence in his letter, and testimony to prove the contrary. Upon the whole, when the above considerations are taken in conjunction with this, that it is hardly possible to assign a reason why Inerarity should not have appeared openly in purchasing and transmitting this cargo at New-Orleans, they cannot but so load his claim with suspicion, as to make it a case for condemnation, unless he can furnish some satisfactory explanation on the subject. |

But what is the explanation? This leads us to the consideration of p. 430
the affidavits. And here it is, with extreme regret, that we are called upon to declare, that we can attach no credence to them. Inerarity has forfeited his claim to the respect of this court by taking an oath to a fact which might, indeed, by possibility, have been true, but which he could not have known to be true. He has sworn that this parcel of cotton, so clearly proved to have been purchased at New Orleans, was of Spanish origin. This is a part of the machinery, an authenticating document, and its foulness communicates a taint to the residue. But his test affidavit bears, upon the face of it, another proof that he is an incautious swearer. For he testifies, with the same confidence that he does of his own claim, that the two hundred bales shipped for Platzman & Gosler were their absolute property. The testimony of some other witnesses is offered in evidence, all subject to the same objection that they swear with similar confidence to a fact that they can know nothing of positively. These affidavits, together with several tending to discredit the testimony of Dayton, and one from Mr. Jenner, of the house of Eason, Jenner & Co., constitute all the evidence brought in upon the order for farther proof. The affidavit of Jenner goes to negative the interest in the house of Eason, Jenner & Co. It also goes to prove that his house believed Inerarity to be the sole proprietor of this shipment. But what are we to think of the discretion of this witness also, who undertakes to swear, in terms the most positive, that A. Glennie & Co. had no

p. 431 interest | in this shipment? The case, indeed, furnishes no reason to believe they had; but on what ground can this witness undertake to deny positively a fact which, with him, could only rest on belief? In none of these affidavits is there any thing to negative the probable American interest which the evidence makes out. And can there be a pretext for contending that Inerarity could resort to no other evidence to satisfy this court of the fairness of his claim? Where is his correspondence with Milne? What was to have prevented him from showing how he bought and paid for this cotton? His accounts current with his agents or factors might have thrown great light upon this transaction. He has had ample time to do this, and the practice of the court, not less than our strong conviction that he never can vindicate his claim, must now oblige us to shut the door upon him.

The logwood must share the fate of the cotton, blended in the same claim. This we consider as the positive law of the admiralty; and although highly penal, is not without its beneficial effects in deterring neutrals from attempting frauds upon belligerant rights.[1] |

p. 432 Sentence as to the ship reversed; affirmed as to the cargo, except the logwood, which was condemned.

The Elsineur.—Jones, claimant.

(1 Wheaton, 439) 1816.

Where an inspection and comparison of original documents is material to the decision of a prize cause, this court will order the original papers to be sent up from the court below.

Appeal from the circuit court for the district of Georgia.

In this case, which was principally a question of fact, *Pinkney* and *Charleton*, for the claimant, stated, that the condemnation in the court below was partly grounded on a comparison of certain documents in this case, with a paper invoked from the *Stackelburg*, another prize cause brought from the same court; that comparison of hands can never be

[1] Vide, 2 *Rob.* 1. The Eenrom. *Ib.* 154. The Calypso. 3 *Rob.* 111. The Graaf Bernstorff. So, also, in the courts of municipal law it is held that property insured and warranted to be neutral, must not only have every document necessary according to treaties and the law of nations to prove its neutrality, but it must not be accompanied with any papers that compromit its neutral character. It is a maxim that neutral commerce is to be conducted with good faith towards belligerants. *Their* rights are to be respected as well as those of neutral nations. It is not sufficient that a part only, but the whole property covered by the policy must be neutral. And if a cover is attempted for *enemy's* property, by an intermixture with *neutral*, it is held to subject the whole to confiscation. 1 *Caines' Rep.* 565. Blagge *v.* The N. Y. Ins. Co. And if the general agent of a neutral cargo covers enemy's property in the same vessel, though without the consent or knowledge of his principal, the property of his principal is condemnable, (notwithstanding it may be distinguished by the papers,) and the warranty of neutrality is not fulfilled. 2 *Binney*, 308. The Phœnix Ins. Company v. Pratt et al.

evidence in a court that has not the two writings before it; and that the original papers might be brought up from the court below, in the same manner as the record is removed upon a writ of error, in England.

March 21st.

The following order was made by the court:

In this case it is ordered, that the claimant make farther proof respecting the letter dated at St. Barts, September 1st, 1813, and signed Jasper D. Blagge, which is now offered to the court; that he show where he received it, and why it has been so long suppressed. It is farther ordered, that the clerk of the circuit court for the district of Georgia, do, under | the p. 440
direction of the judges of that court, transmit, by some safe conveyance, to this court, the original papers following, to wit, the Swedish registers of the Elsineur, of the Allemon, and the Stackelburg; the burgher's brief to Peter Hofstrom and to Runnels, and the bill of sale to Blagge. The claimant is also required to state the persons to whom the vessel and cargo were consigned at Bath, in the voyages to that place, together with a detailed account of those voyages.

The Hiram.—Cornthwait et al. claimants.

(1 Wheaton, 440) 1816.

An agreement in a court of common law, chancery, or prize, made under a clear mistake, will be set aside.

Navigating under a license from the enemy is cause of confiscation, and is closely connected in principle with the offence of trading with the enemy; in both cases, the knowledge of the agent will affect the principal, although he may, in reality, be ignorant of the fact.

APPEAL from the circuit court for the district of Massachusetts. This was a vessel laden with flour, and bound from Baltimore to Lisbon, captured, and finally condemned by this court at February term, 1814, for sailing under a license from the enemy. The present case was that of the claimants of a greater part of the cargo. The ship was owned, | and the license procured, by Samuel G. Griffith, a citizen of the United p. 441
States. Separate bills of lading were at first signed by the master, one for each shipper, and separate letters of instruction were given to Patterson Hartshorne, the supercargo. But, in the expectation, as was alleged, that in case of detention the delay and expense would be less considerable if the cargo appeared to be the property of one individual, than if there should be several small claims, one general bill of lading was signed to the owner of the ship, and one general letter of instruction was given in his name to the supercargo, so as to make the whole cargo appear to be owned by Mr. Griffith, the owner of the ship, and of a small part of

the cargo. At the May term, 1814, of the circuit court, the property of the claimants was condemned by that court upon the ground that their counsel had, at the preceding term, entered into an agreement with the captors that the decision of the supreme court, as to Griffith's claim, should conclude the rest. Of this agreement the circuit judge had made a memorandum in his minute book, but it was not entered on the records of the court until the May term, at which condemnation was pronounced, when it was admitted by the claimants' counsel to have been made, and was recorded. From this last sentence of condemnation, an appeal was taken to this court.

Pinkney, for the appellants and claimants. 1. The claimants of the cargo cannot be concluded by the verbal agreement in the court below, so as to exclude them from farther proof. The agreement was, |
p. 442 that the decision of this court, as to the ship, should bind the fate of the cargo, and was entered into upon a mistaken supposition that the question was the same in both cases. The court of chancery will grant a rehearing though the parties have entered into an order by consent to abide the decree, and not to appeal.[1] If a court of equity will do it, why will not a court of prize, which is still more liberal in its practice, do the same thing? 2. Although farther proof was ordered by the court below, it did not apply to the claimants' case as distinguishable from that of the ship owner, and they may, and ought to, be let in to farther proof again.[2] 3. The principle on which a court of prize proceeds in confiscating the property of a citizen for the offence of sailing with a license from the enemy, has its root in the municipal code. It is but enforcing the rule of municipal law, as to allegiance, in a court of the law of nations. Therefore, the party cannot be liable to a penalty *civiliter* unless he would have been liable *criminaliter*: the presumption of law is, indeed, against the party, but it is a presumption which will bend to fact; and there must be an *actual* participation by knowing the fact, or a *virtual* participation in neglecting to make the proper inquiries. If the fact of trading with the enemy be a misdemeanor, the *scienter* must be laid in the indictment; and it must be a misdemeanor, or a
p. 443 court of prize cannot | furnish it. Resistance to the right of search by a neutral, ignorant of the existence of war, does not import confiscation.[3] Why? Because there was no intention to commit an offence. Ignorance of one part owner of a ship, where the owners are not general partners, will exempt his share from the penalty of confiscation for carrying contraband.[4] Spoliation of papers, by the master, does not preclude the owners from farther proof, though it does preclude him.[5] The owner

[1] 3 *Peere Will.* 242. Buck v. Turcott. 1 *Vern.* 274. *Vide* 2 *Ves.* 458.
[2] 2 *Rob.* 322. The Harmony. 6 *Rob.* 132. The Franklin.
[3] 5 *Rob.* 33. The St. Juan Baptista.
[4] 1 *Rob.* 330. The Jonge Tobias.
[5] 2 *Rob.* 108.

of the cargo is not held responsible for the master's breach of blockade, unless the blockade was known to exist before the voyage commenced.[1] There must be the intention as well as the act of trading with the enemy to constitute guilt. The *continentiam delicti* is here wanting; the ship owner was not the agent of the claimants for this purpose; and supposing the supercargo to have been their agent, where will be found the application of the maxim *respondeat superior?* In the prize court, when acting in the sphere of its proper jurisdiction of cases arising under the *jus gentium:* but this is the case of the property of a citizen taken in violation of his local allegiance. The court must, therefore, adopt the maxim of domestic jurisprudence, that guilt is never to be presumed, but always to be proved.

Dexter, for the respondents and captors, in reply. The agreement in the court below, that the case of | the present claimants should abide p. 444
that of the ship owner in this court was acknowledged by both parties, and recorded *nunc pro tunc*. It is impossible, under the circumstances of this case, that it should be a fact that the owners of the cargo did not know the existence of the license; and, therefore, it is impossible for them to prove their ignorance of it. The claimants are affected with knowledge, by the knowledge of their agents—the ship owner and the supercargo; but it is superfluous to discuss the question of law, the facts are so clear.

MARSHALL, CH. J., delivered the opinion of the court.

When the claimants, in this case, applied to the circuit court to be let in to farther proof, for the purpose of showing their ignorance of the fact that the *Hiram* sailed under the protection of a British license, the judge of that court considered the agreement of the parties that these causes should depend on the fate of Griffith's claim, under which agreement the sentence, that would otherwise have been pronounced against them, was suspended until the decision of the supreme court on that claim should be made, as having the same validity as if that agreement had been entered, at the time, on the records of the court. In that opinion, there having been no doubt respecting the fact, this court concurs. But this court is also of opinion that if the agreement was made under a clear mistake, the claimants ought to be relieved from it, where it could be done without injury to the opposite party. If a judgment be confessed | under a clear mistake, a court of law will set that p. 445
judgment aside, if application be made, and the mistake shown while the judgment is in its power. An agreement, made a rule of court, to confess a judgment cannot be stronger than a confession itself; and, of course, a party will not be compelled to execute such an agreement, but will be allowed to show cause against the rule in a case where it was plainly entered into under a mistake. If the judgment be no longer

[1] 5 *Rob.* 262. The Adonis. *Ib.* 267. The Shepherdess.

in the power of a court of law, relief may be obtained in chancery. Still more certainly will an agreement, entered into in a suit originally depending in a court of chancery, be relaxed, or set aside, it if be proved to the court to have been entered into under a mistake. The case cited from *Peere Williams* is directly in point.

These principles are of universal justice, and of universal obligation. They cannot apply with less force to causes depending in prize courts than to causes depending in other courts. The propriety, then, of rejecting further proof in this case, and of condemning the property claimed by the appellants will depend on the clearness with which they show the mistake under which the agreement was made, and on their ability to support their case if that agreement be set aside. If a real and substantial difference exists between the case of the present claimants, and that formerly decided by this court, there will not be much difficulty in yielding to the suggestion, supported, as it is, by the proof now offered, that this agreement was made without knowledge of that difference,
p. 446 and, consequently, by mistake. | But the question then occurs, whether restitution ought to be decreed to them, if the obligation of the agreement be removed.

The claimants allege that, in point of fact, they did not know that the Hiram sailed under a British license, and the proof they offer goes far in supporting this allegation. It is admitted that ignorance of this fact will save from the forfeiture incurred by it, unless the claimants have such constructive notice as will preclude them from showing the want of actual notice. It has been argued that the transaction rendered Griffith the agent of the other shippers, so as to infect their claims with his knowledge ; that by consenting that their property should be shipped in his name, it becomes liable to all the risks to which it would have been exposed had it been actually his. It has been also argued that the supercargo is clearly the agent of the shippers, and that his knowledge of the license being on board is, constructively, their knowledge. The counsel for the claimants endeavours to rescue his clients from the effect of this constructive notice, by contending that the principle of *respondeat superior* can never apply to a case of a criminal nature ; that a license works a forfeiture, because it is a breach of allegiance—an offence which cannot be imputed to a person having no knowledge of the criminal act which constitutes the breach of allegiance: and that this principle has, in prize courts, been applied to cases punishable under the law of nations ; not to offences against the government of the captor and captured. |

p. 447 The court considers the sailing, under an enemy's license, as closely connected, in principle, with the offence of trading with the enemy; in which case it is believed to be incontrovertible, that the knowledge of the agent would affect the principal, although he might, in reality, be

ignorant of the fact.[1] Upon this ground, the sentence of the circuit court is affirmed with costs.

Sentence affirmed.

The Dos Hermanos.—Green, claimant.

(2 Wheaton, 76) 1817.

In prize causes, the evidence to acquit, or condemn, must come, in the first instance, from the papers and crew of the captured ship.

It is the duty of the captors to bring the ship's papers into the registry of the district court, and to have the examinations of the principal officers and seamen of the captured ship taken on the standing interrogatories. |

It is exclusively upon these papers and examinations that the cause is to be heard p. 77
in the first instance: If, from this evidence, the property clearly appears to be hostile or neutral, condemnation or restitution immediately follows: If the property appears to be doubtful, or the case suspicious, farther proof may be granted according to the rules which govern the legal discretion of the court.

If the parties have been guilty of gross fraud, or misconduct, or illegality, farther proof is not allowed, and condemnation follows.

Although some apology may be found in the state of peace which had so long existed previous to the late war, for the irregularities which had crept into the prize practice, that apology no longer exists; and if such irregularities should hereafter occur, it may be proper to withhold condemnation even in the clearest cases, unless the irregularities are avoided or explained.

If a party attempts to impose upon the court, by knowingly or fraudulently claiming as his own, property belonging in part to others, he will not be entitled to restitution of that portion which he may ultimately establish as his own.

It seems that where a native citizen of the United States emigrated before a declaration of war to a neutral country, there acquired a domicil, and afterwards returned to the United States during the war and re-acquired his native domicil, he became a redintegrated American citizen; and could not afterwards, *flagrante bello*, acquire a neutral domicil by again emigrating to his adopted country.

The claimants have no right to litigate the question whether the captors were duly commissioned; the claimants have no *persona standi in judicio* to assert the rights of the United States: But if the capture be made by a non-commissioned captor, the prize will be condemned to the United States.

Appeal from the district court for the Louisiana district.

This was the case of a Spanish schooner captured on the 18th of October, 1814, by Mr. Shields, a purser in the navy, commanding an armed barge, in the service of the United States, ostensibly bound with

[1] Thus, where a shipment was made to the enemy, by the partners of a house of trade, resident in a neutral country, without the knowledge or consent of a co-partner resident in the belligerant state, his share was held liable to confiscation. 6 *Rob.* 129. The Franklin. And it appears, from that case, that even an inactive, or sleeping partner, (as it is termed,) has been held, by the Lords of Appeal, incapable of receiving restitution in a transaction in which he could not lawfully be engaged, as a sole trader. *Ib.* 131.

a cargo of crates and dry-goods, on a voyage from Jamaica to Pensacola,
p. 78 but in fact in pursuance | of an asserted change of destination, then in prosecution of a voyage to New-Orleans. The schooner was delivered up, and prize proceedings were instituted against the cargo, in the district court for Louisiana district. Upon the return of the monition various claims were interposed for small adventures or parts of the cargo; but the only questions before the court arose upon the claim of Mr. Basil Green, calling himself a citizen of the Republic of Carthagena, who, by his agents, Mr. John F. Miller and Messrs. Lewis & Lee, asserted an ownership to nearly the whole of the cargo. Mr. Miller, in his affidavit annexed to the claim, states, 'that he purchased the goods so claimed, with moneys in his hands belonging to the claimant; that at the time of the purchase, he expected to have had an interest therein, but that on his arrival at New-Orleans, the attorney in fact of the said claimant (meaning Mr. Lewis) refused to allow any such interest, and the deponent is therefore obliged to give up the same; and this deponent further saith, that the facts contained in the said claim are true to the best of his knowledge, information, and belief.' At the hearing in the district court, the claim was rejected, and the goods were condemned as the property of enemies, or of citizens trading with the enemies of the United States.

February 11th.

Mr. *Harper*, for the appellant and claimant, argued, upon the facts, that the proprietary interest in the cargo was in the claimant, and that he (though a native citizen) had a right to change his domicil, and did
p. 79 change it *bona fide* to Carthagena, in South America, | where he was a resident merchant, and in his neutral character had a right to trade with the enemy of his native country.[1] He further suggested that the captor was not duly authorized to capture, there being no evidence that the armed barge, which made the capture, was duly incorporated into the navy.[2]

Mr. *Key*, contra, argued that the residence of the claimant at Carthagena was temporary only, and that the whole transaction was infected with fraud and falsehood.

March 3d.

Mr. Justice STORY delivered the opinion of the court.

Before we consider the merits of this claim it may not be unfit to advert to some of the principles applicable to proceedings in prize causes, which seem to have been wholly neglected in the progress of this cause.

It is the established rule in courts of prize, that the evidence to acquit

[1] 1 *Wheat.* 65, note (*i.*)

[2] 5 *Rob.* 41. The Melomane. *Ib.* 252. The Charlotte. *Ib.* note (*a.*) The Island of Curaçoa, &c.

or condemn must, in the first instance, come from the papers and crew of the captured ship. On this account it is the duty of the captors, as soon as practicable, to bring the ship's papers into the registry of the district court, and to have the examinations of the principal officers and | seamen of the captured ship taken before the district judge, or commis- p. 80
sioners appointed by him, upon the standing interrogatories. It is exclusively upon these papers and the examinations, taken *in preparatorio*, that the cause is to be heard before the district court. If, from the whole evidence, the property clearly appear to be hostile, or neutral, condemnation or acquittal immediately follows. If, on the other hand, the property appear doubtful, or the case be clouded with suspicions or inconsistencies, it then becomes a case of farther proof, which the court will direct or deny, according to the rules which govern its legal discretion on this subject. Farther proof is not a matter of course. It is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith. But if the parties have been guilty of gross fraud or misconduct, or illegality, farther proof is not allowed; and under such circumstances, the parties are visited with all the fatal consequences of an original hostile character. It is essential, therefore, to the correct administration of prize law, that the regular modes of proceeding should be observed with the utmost strictness; and it is a great mistake to allow common law notions in respect to evidence or practice, to prevail in proceedings which have very little analogy to those at common law.

These remarks have been drawn forth by an examination of the present record. The court could not but observe with regret that great irregularities had attended the cause in the court below. Neither were the ship's papers produced by the captors, nor | the captured crew examined p. 81
upon the standing interrogatories. Witnesses were produced by the libellants and the claimant indiscriminately at the trial, and their testimony was taken in open court upon any and all points to which the parties chose to interrogate them, and upon this testimony and the documentary proofs offered by the witnesses, the cause was heard and finally adjudged. In fact there was nothing to distinguish the cause from an ordinary proceeding in a mere revenue cause *in rem*.

This court cannot but watch with considerable solicitude irregularities, which so materially impair the simplicity of prize proceedings, and the rights and duties of the parties. Some apology for them may be found in the fact, that from our having been long at peace, no opportunity was afforded to learn the correct practice in prize causes. But that apology no longer exists; and if such irregularities should hereafter occur it may be proper to adopt a more rigorous course, and to withhold condemnation in the clearest cases, unless such irregularities are avoided or explained. In the present case the first fault was that of the captors;

and if the claimant had suffered any prejudice from it, this court would certainly restore to him every practicable benefit. But in fact no such prejudice has arisen. The claimant has had, in the court below, the indulgence and benefit of farther proof and of collateral aids to verify the truth of his claim ; and he stands at least upon as favourable a ground to sustain it as if the cause had been conducted with the most scrupulous form.

p. 82 Two questions have been argued at the bar. First, | whether Mr. Basil Green, the asserted owner, has established his proprietary interest in the goods in question ; and secondly, supposing this point decided in his favour, whether he has proved himself a neutral merchant, entitled by his domicil and national character to a restitution of the property.

It appears by the evidence in the case that Mr. Green was born in Maryland, and resided in that state, and principally at Baltimore, until the year 1809, when he went abroad. In 1811 he resided in Carthagena ; and in the spring of 1813, he came to New-Orleans from Carthagena, in a schooner under Carthagenian colours, and being unable to sell her, he determined, in connexion with Messrs. John F. Miller, Lewis & Lee, and others, inhabitants of New-Orleans, who became jointly interested with him, to fit her out as an American privateer. Accordingly, on or about the 13th of March, 1813, Mr. Green applied to the collector of the customs at New-Orleans for a commission ; and in his petition he described her as the private armed schooner Hornet, of New-Orleans, owned by Basil Green. The commission was granted, and soon afterwards Mr. Green sailed in the privateer on her destined cruise. In June, 1813, he was, as he alleges, compelled by a mutiny of the crew to go to Carthagena, where they deserted, and the cruise was broken up, and the privateer was finally sold ; of all which he gave information to the other owners at New-Orleans, and promised to remit their proportions of the proceeds. While at New-Orleans in April, 1813, Mr. Green executed a letter of attorney,

p. 83 appointing Messrs. Lewis & Lee | of that city, his general attornies and agents, and in this power he described himself, as ' Basil Green, of Baltimore, merchant.' He does not appear since that period, to have returned to the United States. In July, 1814, he was a resident at Carthagena, and is described by one other witness, as having a house and store there. Such are the most material facts respecting Mr. Green's domicil apparent on the record.

In respect to the proprietary interest in the goods claimed by him, the evidence is more complicated. The whole adventure was conducted by Mr. John F. Miller, of New-Orleans, (one of the proprietors of the Hornet,) from whose testimony it appears, that the owners of the Hornet, resident at New-Orleans, having received information of her sale, and being desirous of receiving their funds, he, Miller, on his own account,

and as their agent, determined to make a voyage to Carthagena for this purpose. He accordingly in June, 1814, went from New-Orleans to St. Jago de Cuba, and from thence to Jamaica, (as the only practicable route,) and from thence to Carthagena. When he left New-Orleans, he took a draft from Messrs. Lewis & Lee on Mr. Green, for 2,500 dollars, and a letter from the same gentlemen to Messrs. O'Hara & Offley, merchants at Jamaica, authorizing them to pay him the balance of their accounts, whatever it might be. At Carthagena, in August, 1814, he received from Mr. Green, the sum of 1,500 dollars and 50 cents, in part of the draft of Messrs. Lewis & Lee. He also received from Mr. Green the whole of the nett proceeds | of the sale of the Hornet, amounting to the p. 84
sum of 11,636 dollars, of which his own share amounted to 1,500 dollars, and that of Mr. Green, to 4,129 dollars and 2 cents ; and he gave a receipt to Mr. Green for this amount, promising, on his arrival at New-Orleans, (sea risks and captures excepted,) to pay over to the stockholders their respective proportions, deducting all necessary charges. Mr. Green directed his share to be remitted to his nephew at Baltimore, by written instructions contained in a letter directed to Mr. Miller, as follows : 'Carthagena, August 12, 1814, Mr. John F. Miller. My dear sir—On your safe arrival in the New-Orleans, sea risks and captures excepted, you are authorized and appointed, at my wish, in which you will please to remit on to my nephew, Mr. George A. Stamp, of Baltimore, the sum of 4,129 dollars and 2 cents, after deducting the charges thereon, and you will much oblige your friend—Respectfully—B. Green.' On the 29th of August, Mr. Green addressed a letter to his nephew, in the following paragraph : 'Mr. John F. Miller, a particular friend of mine, will remit on to you, in good bills, after his safe arrival in New-Orleans, the sum of 4,129 dollars and 25 cents, agreeable to his receipt on the same, now in my possession. Perhaps he may remit to you a 1,000 or 1,500 dollars more, if fortune favours his prospects.' At what period Mr. Miller left Carthagena, does not precisely appear, but he says, that he thinks it was before the 20th of August, and that the letter of the 29th of August, was sent to him at Jamaica. Previous | to his departure, he further asserts, p. 85
that Mr. Green gave him verbal instructions to lay out his share of the money in goods, at Jamaica, instead of remitting it to his nephew, and also by a written authority, under date of the 12th of August, authorized him, if he thought proper, to draw on him for the further sum of 2,500 dollars, at five days sight. From Carthagena, Mr. Miller went to Jamaica, where he endeavoured to purchase a small vessel ; but failing in his object, he, on the 9th of September, 1814, chartered the Spanish schooner Dos Hermanos, Captain Delgado master and owner, then lying at Kingston. By the charter-party, which was made by Messrs. O'Hara & Offley, on behalf of the owner of the one part, and Mr. Miller of the other part,

it was agreed that the sum of 1,500 dollars should be given for the charter of the vessel for a voyage from Kingston to Pensacola, in West Florida, and back again to Kingston. That after her arrival at Pensacola, Mr. Miller should put on board, within 18 days, a return cargo of the produce of the country, to be consigned to Messrs. O'Hara & Offley for sale ; and should further invest the amount of the freight in cotton or tobacco, on account of Mr. Delgado, and ship it on the return voyage, freight free, unless, it occupied more than a stipulated portion of the room of the vessel. Mr. Miller was further to pay all port charges, and in case of detention beyond 18 days, demurrage, also, at the rate of 16 dollars per day. And it was further agreed, that if the situation of that part of the world should be such as to preclude any communication between New-Orleans
p. 86 and Pensacola, | and prevent Mr. Miller from procuring a full return cargo or as much cotton and tobacco as should be required for the amount of the charter, then the said amount of 1,500 dollars was to be paid over on account of the said O'Hara & Offley, to Mr. John K. West, of New-Orleans ; and in that event, and payment of all port charges, Miller was to be at liberty to decline loading the vessel on the return voyage. Immediately after the execution of this charter-party, Mr. Miller loaded on board of the schooner the goods in question, through the agency of Messrs. O'Hara & Offley ; and drew a bill for 2,500 dollars in their favour, on Mr. Green, and received from them, for the account of Messrs. Lewis & Lee, the sum of 900 dollars. The whole cargo, with an inconsiderable exception, was documented as the property of a Don Juan Lesado, of Pensacola, and purported to be the proceeds of the sales of a former cargo consigned by him to Messrs. O'Hara & Offley. Among these documents, which are asserted by the claimant to be merely colourable, there is an invoice account current of the sales of a supposed former cargo ; and a letter of advice, stating that the schooner was chartered for the voyage on account of Don Juan Lesado, and that the cargo, consisting of dry goods, was a return cargo purchased by his orders. There is, also, a bill of lading consigning the cargo to the same person. Mr. Miller alleges this artifice to have been resorted to to preserve the shipment from British and Spanish capture. The schooner sailed on the voyage about the 13th of
p. 87 September, with Mr. Miller on board, | and having been driven by currents considerably to the westward of Pensacola, and being in the Bay of St. Bernard, Mr. Miller left the schooner about the first of October, in a boat, which he had purchased at Jamaica, for the purpose, and proceeded for New-Orleans, leaving the property under the control and directions of a Mr. Bassett, who was a passenger on board. On the 13th of October, Mr. Miller arrived at New-Orleans. In the meantime the schooner proceeded to Dauphin Island, and there Mr. Bassett undertook (as he alleges) to change the destination, and determined to proceed

to New-Orleans; and, for this purpose, on the 14th of October, 1814, he entered into a new charter-party in behalf of Mr. Miller, by which it was agreed between Mr. Bassett, as agent of Mr. Miller, and Captain Delgado for himself and Messrs. O'Hara & Offley, that for the additional sum of 1,100 dollars, the vessel should immediately proceed from Dauphin Island for the Bayou St. John, near the city of New-Orleans, and there deliver the said cargo to Mr. Miller, his agents or assigns. The schooner was soon afterwards captured by the libellants, detained in the Bay of St. Lewis, and subsequently brought to Petit Coquille. After his arrival at New-Orleans, and before knowledge of the capture, Mr. Miller wrote the following letter to Mr. Bassett :—'New-Orleans, 15th of October, 1814. Dear sir, I arrived here on the 15th in the morning, after 12 days suffering, and found all my family as well as could be expected from the situation of this place and Pensacola. I have thought proper to remain | without doing any p. 88
thing until I hear of your arrival, and news from you. I would advise, by all means, to fetch the vessel and cargo to Mobile point, if no farther, if possible. I believe it can be done without much or no danger. I believe, also, it is practicable to procure a permission from the English commander to come to New-Orleans with the schooner, provided you promise to return with provisions that they stand in need of. Try every means in your power to effect the arrival here of yourself and schooner. Should you get the schooner here, I shall meet a ready sale for the crockery ware, and the schooner a ready despatch. Blankets sell ready at nine dollars per pair. Try and make arrangements with Delgado to fetch the schooner here, as it is certainly greatly to his advantage as well as ours. I depend upon your known activity, and remain your friend. In haste, the vessel is about to sail. (Signed.) JOHN F. MILLER.

P. S. All those pirates are destroyed at Barataria. Tobacco, best quality, six cents, dull.

(Signed.) MILLER.

I have not time to write to Delgado, but will next opportunity. Should you not have consigned the schooner and cargo to any person, you may place any confidence in Mr. Joseph Moreiga, as I know him well.'

Mr. Miller asserts that he brought a considerable sum of money in dollars and doubloons from Jamaica, of which he took 4,500 dollars, when he left the schooner, in the boat, for New-Orleans, and the residue, amounting to about 18 or 1900 dollars, which was stored away in several crates of | goods, he afterwards contrived to obtain from the schooner in p. 89
the night time while she lay at Petit Coquilles. All the letters brought in the schooner from Jamaica were taken by Mr. Miller, and all the documents respecting the cargo came from his hands during his several examinations in court.

Such is the general outline of the case, as to the question of proprietary

interest in the goods claimed in behalf of Mr. Green. An examination of some other minute, though important particulars, will properly arise in the subsequent discussion of this question.

The first thing that strikes us on the slightest survey of this cause, is the total absence of all documentary proof to establish the claim of Mr. Green. The shipment was made in the enemy's country in the name of an enemy, and ultimately destined for sale at Mobile or New-Orleans, if the parties should be able to accomplish the voyage. The property was clothed with a Spanish character, as Mr. Miller asserts, to protect it from British and Spanish capture. It is certainly the duty of neutrals to put on board of their ships sufficient papers to show the real character of the property, and if their conduct be fair and honest, there can rarely occur an occasion to use disguise, or false documents. At all events, when false or colourable documents are used, the necessity or reasonableness of the excuse ought to be very clear and unequivocal to induce a court of prize to rest satisfied with it. To say the least of it, the excuse is not, in this case, satisfactory; for the disguise is as strongly pointed to elude
p. 90 American, as | British or Spanish capture. It is not pretended that any genuine papers were put on board, or are now in existence, which would explain the circumstances; for Mr. Miller himself, in an answer to an interrogatory on this point, says he had from Mr. Green no written instructions, nor did he enter into a written contract with Mr. Green respecting the goods to be purchased at Jamaica; that Mr. Green would have given written instructions, but he, Mr. Miller, objected to it, as in case of capture it would have been insecure. He adds, that there are no letters or papers at Carthagena that can throw any light on this subject, and that not having received any, he was unwilling to leave any.

In the next place, there is not, with the exception of Mr. Miller's, the slightest testimony from the ship's crew that the property belonged to Mr. Green. The master and mate of the schooner, and Mr. Bassett also, the agent of Mr. Miller, expressly state, that they always believed Mr. Miller to be the real owner, and that he never named any other person to them as the owner, though he sometimes alluded darkly to a possible ownership in others. It is a general rule of the prize law, not to admit claims which stand in entire opposition to the ship's papers, and to the preparatory examinations, where the voyages have originated after the war. The rule is founded upon this simple reason, that it would open a door to fraud in an incalculable extent, if persons were not required to describe their property with perfect fairness. The rule, however, is not
p. 91 inflexible; it yields to cases of necessity, or where, | by the course of the trade, simulated papers become indispensable, as in a trade licensed by the state with the public enemy. It may be said, that the rule cannot be applied to the present case, because Mr. Miller is to be deemed one of the

ship's crew, although he had, some time before the capture, left the vessel, and was, at the time of capture, at New-Orleans ; and that his examinations (for he was examined several times) established the interest of Mr. Green, and so the claim is consistent with what ought to have been the evidence *in preparatorio*. Assuming this argument to be correct, on which we give no opinion, the circumstances of this case call for the most plenary explanations to dissipate the doubts which cannot fail to be awakened.

These explanations come altogether from Mr. Miller, and are unsupported by any corroborative documents, or facts asserted upon independent testimony. All that the other principal witnesses have testified to, which bears directly on the cause, consists of declarations or confessions, or acts of Mr. Miller, after his return to New-Orleans. Mr. Miller himself certainly stands in a predicament which does not lend additional credit to his assertions. He was the projector of the voyage, and the conductor of all its operations. He chartered the vessel in *his own name* ; and if he was acting for Mr. Green, and not for himself, what motive could there be for him to conceal his agency from Messrs. O'Hara & Offley, or from Captain Delgado ? The voyage itself was illegal in an American citizen. The charter-party | stipulated for a return cargo to p. 92
Jamaica, which was to be furnished by Mr. Miller, and he does not pretend that this cargo was to have been shipped on Mr. Green's account. It must have been a traffick on his own account, or a joint concern with Messrs. O'Hara & Offley ; and in either view was a surrender of all the obligations which he owed to his country. These considerations cannot certainly increase our confidence in the integrity of the conduct of Mr. Miller.

On examining his testimony there are many circumstances which cannot fail to create unfavourable doubts. The test affidavit itself is couched in very equivocal language. Mr. Miller there asserts, that at the time of the purchase he expected to have an interest in the goods, but that on his arrival in New-Orleans, the attorney in fact of the claimants refused to allow any such interest, and the deponent was obliged to give up the same. What authority could Mr. Lewis, the attorney here alluded to, have to intermeddle with Mr. Miller's interest in the shipment ? He was not the consignee of the property, nor was he confidentially acquainted with any agreement or instructions of Mr. Green relative to the voyage. It is scarcely credible that the real consignee of the goods, having an interest in them, should, under such circumstances, yield it up to a mere intruder. In his examination in chief, Mr. Miller states, that it was his original intention to have invested his own funds, as well as Mr. Green's, at Jamaica ; but he was induced to abandon it by reports that the British intended to occupy Pensacola | and Mobile Point ; and he explains his p. 93

interest in the shipment to have been only a right to one third of the profits in lieu of commissions.

This representation is not consistent with the language held by Mr. Miller on other occasions. After the capture Mr. Miller stated to Captain Delgado, that ' he had got himself into a difficulty in consequence of his (Delgado's) coming here ; that the *greater part of the funds invested in the goods belonged* to Mr. Green ; that he (Miller) was acting for others, and that he feared he should get himself into difficulty.' Upon an inquiry from the same person during the voyage from Kingston, whether he was the owner, Mr. Miller answered, ' that he did not know—that he had funds from Carthagena.' On another occasion, Mr. Miller gave another witness, (Mr. M'Ilvaine) to understand, ' that the cargo was purchased on his (Miller's) and Green's account.' And in a conversation with a Mr. West, who was the confidential agent of Messrs. O'Hara and Offley, and received a letter by the schooner advising him of the voyage, he left the impression on Mr. West's mind that the cargo was his own. The language, too, that Miller held with Mr. Heins, (the mate of the schooner,) after the capture, is very significant. He said, ' It was a hard case that he should lose his property in that way ; that it was the earnings of many years.'

There are some other discrepancies in the declarations of Mr. Miller, which are not easily to be accounted for. Mr. Miller, in his examination,
p. 94 states, that Mr. Green authorized him to invest in goods | the money belonging to him ; and that after he chartered the schooner it was his intention to lay out Mr. Green's funds, as well as his own, in the purchase of goods ; but that subsequent events induced him not to lay out his own funds, and that he laid out for Mr. Green about 6,000 dollars only. In his conversation with Mr. Lewis he stated, that there was no arrangement between Mr. Green and himself ; that if he thought proper upon his arrival at Jamaica, he might invest in goods the whole of the 11,686 dollars, and more, (for which he was authorized to draw on Mr. Green, if necessary,) on the joint account of himself and Mr. Green ; that after his arrival at Jamaica he thought he would enter into this speculation ; and, thereupon, he drew upon Mr. Green for 2,500 dollars ; and that after the draft was made he discovered that he had not any right to make this disposition of the funds of the stockholders in the Hornet, and, accordingly, he laid out 6,000 dollars of Mr. Green's money, supposing he ought to have an interest in it himself, as a compensation for his trouble.

In determining the real character of this whole transaction it becomes material to ascertain the true value of the cargo shipped by Mr. Miller. He asserts it to be about 6,000 dollars ; but no original invoice, or other genuine paper is produced to prove its cost at Jamaica. According to Mr. Bassett, it was worth about 7 or 8,000 dollars ; and Capt. Delgado

says, that while lading it, Mr. Miller told him it would amount to about 8 or 10,000 dollars. If their cargo cost but 6,000 dollars, it may be asked, what became of the residue of the money in the | hands of Mr. Miller ? p. 95
According to his own account, he received for the sales of the Hornet 11,636 dollars ; from O'Hara & Offley 900 dollars ; and he drew a bill on Mr. Green, in part payment of the goods, for 2,500 dollars, making in the whole, the aggregate sum of fourteen thousand dollars. There remained, therefore, after the purchase of the goods, in the hands of Mr. Miller, about 8,000 dollars. What has become of this fund belonging to himself and the stockholders in the Hornet ? Here, as indeed in every other material part of the cause, the explanation comes exclusively from Mr. Miller. He says, that when he left the schooner in St. Bernard's Bay, he took away with him in the boat the sum of 4,500 dollars ; and that while the schooner lay at Petit Coquilles, he took away from some crates on board of the schooner, in which it was concealed, the further sum of 18 or 1900 dollars. It is true that Captain Delgado says that when Miller left the schooner he took away with him a bag, which, he supposes, contained dollars, but he does not pretend even to guess at the amount ; and it is remarkable, that none of the passengers are interrogated on this subject. But the statement in relation to the 18 or 1900 dollars is wholly incredible. The mate flatly denies that it could have been taken out of the crates in the manner which Miller asserts ; and Mr. Bassett manifestly considers it almost impossible. What adds to the incredibility of the statement is, that when Mr. Miller left the schooner, he never informed Mr. Bassett that there was any money concealed in any of the crates, although he expressly constituted him his agent to dispose of the cargo, without any reserve. |

If the funds were brought to New-Orleans in money, as Mr. Miller p. 96
pretends, nothing could have been more easy of proof than the fact, considering that a large proportion of it belonged to the other stockholders in the Hornet. By the very terms of his receipt he was bound to pay over to them their respective proportions *on his* arrival at New-Orleans. Has he done so ? There is not the slightest proof to this effect in the case. On the contrary, several of the stockholders, or their agents, have been examined, and not one of them admits his proportion to have been paid. Indeed, Mr. Miller himself admits that he has never paid any ; and gives this extraordinary excuse, that he had orders from Mr. Green not to pay over the money until three months after his arrival at New-Orleans. This excuse is entirely at variance with the receipt given by Mr. Miller, and is as little reconcilable with the letter of Mr. Green to his nephew, respecting his own remittance. It may be added, that the statement itself has very little intrinsic probability to support it.

It is, therefore, no harshness to declare, that the declarations of

Mr. Miller, that he brought home so very considerable a sum, are not of themselves entitled to much credit, and, under the circumstances, cannot be received as satisfactory evidence of the fact by this court; and if so, then every suspicion that the whole funds were invested in the cargo is greatly inflamed, and every doubt of the good faith of the present claim materially strengthened.

There are many other circumstances in the case which tend to a dis-
p. 97 credit of the claim; but it would | occupy too much time to discuss them minutely. One circumstance, however, deserves particular notice. It is the letter of Mr. Miller written to Mr. Bassett, after his arrival at New-Orleans, which may almost be said to carry, in every line of it, the language and feelings of an owner of the goods. And it adds no inconsiderable force to these observations, that the only documents on board pointing to Mr. Green, are inconsistent with the supposition that the goods were purchased on his account; and the only doubtful expression in them may well be satisfied as referring to money to be obtained by Mr. Miller, from a Mr. Hardy, of Jamaica, who was indebted to Mr. Green.

Considering, then, that the present claim rests altogether upon the testimony of Mr. Miller, given by him after he well knew the form and pressure of the cause, and liable, as it must be, to the strongest doubts, both from the predicament in which he stands, and the circumstances which have been already stated, the court cannot admit that it is supported by any reasonable evidence. It is not material in our view, whether the property belonged wholly to Mr. Miller, or to him jointly with Green, or was purchased with the funds of the stockholders of the Hornet, on his own account, as an unauthorized speculation, or on joint account with their authority; for in either case it is liable to the same judgment. It is a settled rule of this court, that if a party will attempt to impose upon the court by knowingly or fraudulently claiming as his own property belonging in part to others, he shall not be entitled to
p. 98 a restitution of that portion which he may ultimately establish | as his own. This rule is founded in the purest principles of morality and justice, and would bear upon the claim of Mr. Green, supposing his domicil, as a neutral, were ever so clearly established.

In respect to the domicil of Mr. Green, there is certainly much reason to doubt if it would be sufficient to protect him, even if he could show himself, at the time of the capture, a citizen of Carthagena. For, if upon his return to New-Orleans after the war, he acquired a domicil there, (of which, the circumstance of his becoming the owner of a privateer in that port, affords a strong presumption,) he became a redintegrated American citizen, and he could not, by an emigration afterwards, *flagrante bello*, acquire a neutral character so as to separate himself from that of his native country.

The counsel for the claimant, aware of the pressure of his case upon the present evidence, has prayed to be admitted to make farther proof, which he states to be now in his possession. If this cause turned upon the question of domicil, the court would feel little hesitation in admitting it. But considering the manner in which the cause was conducted in the court below, and that the claimant there had the benefit of farther proof, and that it appears to us that upon the question of proprietary interest, the cause now admits of no fair and reasonable explanation, consistent with an exclusive interest in Mr. Green, we do not feel at liberty to make an order for farther proof. We are not satisfied that it would be a safe or convenient rule, unless, under very special circumstances, to allow parties who have had the benefit | of plenary proof in the court below, to have an p. 99
order for farther proof in this court upon the same points. Much less should we incline to allow it in a case of pregnant suspicion, where the evidence must come from sources tainted with so many unwholesome personal interests, and so many infusions of doubtful credit.

The claim of Mr. Green must, therefore, be rejected, and the goods be condemned as good and lawful prize.

It has been urged, that there is no evidence upon the record that the captors were duly commissioned, and that farther proof ought to be required on this point. This, however, is a question which the claimant has no right to litigate. He has no legal standing before the court to assert the rights of the United States. If the capture was without a commission, the condemnation must be to the United States generally; if with a commission, as a national vessel, it must still be to the United States, but the proceeds are to be distributed by the court among the captors according to law. It will be time enough to require the commission to be produced, when the proceeds are to be distributed by the court, if the United States shall then insist upon any exclusive claim.

Decree affirmed with costs.

The Mary.

(2 Wheaton, 123) 1817.

Where an enemy's vessel was captured by a private armed vessel of the United States, and subsequently dispossessed by the force or terror of another; the prize was, under the circumstances of the case, adjudged to the first captor, with costs and damages.

APPEAL from the circuit court for the district of Massachusetts.

The British schooner Mary, whereof Charles Thomas, jr. a British subject, domiciled at St. Johns, New Brunswick, was late owner and master, sailed under convoy from St. Johns, New Brunswick, bound to

Castine, then in the military occupation of the British, laden with a cargo, the growth, produce, and manufacture of British possessions, shipped by British merchants domiciled in St. Johns, N. B. to merchants resident in Castine.

The schooner Mary was captured by the private armed schooner *Cadet*, between Duck Island and Mount Desert, on the night of the 25th of December, 1814, between the hours of 11 and 12; the convoy under which the Mary sailed, was in sight of the Mary at the time of her capture; but no other vessel was in sight at that time. The *Cadet* came up with the Mary so suddenly, that she had no opportunity to make resistance, or give notice to the convoy of her danger.

p. 124 | After the capture of the Mary, the principal part of her cargo was taken on board the *Cadet*, carried into the district of Massachusetts, and, in the district court of said district, condemned to the *Cadet* as prize of war.

On the morning of the 26th of December, after sun-rise, the *Cadet* and Mary being then in company, an armed brig, the *Paul Jones*, was discovered by them, under such suspicious circumstances, as to induce them to believe her to be a British cruiser, and, in consequence, to part, and steer different courses. The sails of the *Paul Jones* were of English canvass. She pursued the Mary, firing at her, until between 4 and 5 o'clock, P. M. of the 26th of December; the Mary had then arrived in a bay of the United States, to wit, Wheeler's bay, a bay frequented by American vessels. The Mary being within half a mile of the shore, and within the same distance of the *Paul Jones*, and being in such a situation as rendered it certain that she must be intercepted by the *Paul Jones*, the prize master and crew, considering it certain, from her appearance and actions, that the *Paul Jones* was an English cruiser, left the Mary for the shore, after having thrown over her anchor, and ordered the British captain, and his son of twelve years of age, who were left on board, to pay away the cable.

After the prize crew left the Mary, the British master hoisted English colours, and steered the schooner towards the *Paul Jones*.

Ten minutes after the prize crew left the Mary, she was boarded by a boat from the *Paul Jones*, when the English captain informed them
p. 125 that the | Mary was an English vessel, prize to the *Cadet*, when the *Paul Jones* immediately stood off from the land with the Mary in company, with English colours still flying.

A boat, then out to the windward of the Mary, and within musket shot, or a quarter of a mile distant from her, (the crew then lying on their oars, the sea smooth, and the wind light,) repeatedly hailed the Mary, both before and after she was boarded by the *Paul Jones*, and received no answer.

The prize master of the Mary, immediately on his getting on shore, despatched a boat on board her to ascertain the national character of the

vessel by whom she was boarded, and claim her if the boarding vessel should prove American; but, before the boat could get off, the *Paul Jones* had sailed with the Mary in company.

Libels against the Mary and cargo were filed in the district court for the district of Maine, by David Elwell, in behalf of himself, and the owners, officers, and crew, of the private armed schooner *Cadet*, and by John Thomson Hilton, in behalf of himself, and the owners, officers, and crew, of the private armed brigantine *Paul Jones*. The Mary and cargo were condemned in the district court for the district of Maine, to John Thomson Hilton, and the owners, officers, and crew, of the *Paul Jones*. An appeal was entered from said decree by David Elwell, and the owners, officers, and crew, of the *Cadet*, in the circuit court of Massachusetts. In consequence of the affinity of the judges to the parties, the decree of the district court of Maine was, | by consent of parties, affirmed *pro forma*, and the p. 126
cause brought, by appeal, to this court.

February 12th.

Mr. *Jones*, for the appellants. This is a case of novel impression as to the circumstances, but long since settled in principle. The prize crew of the *Cadet* were driven out of the Mary by the terror or the force of the *Paul Jones*. It is not the case of a prize abandoned and taken as *res nullius*, nor retaken by the original British crew, and recaptured by the Paul Jones. The prize was in a place of safety, *infra præsidia*; not constructively, as of a fleet, or a neutral port, but of a port of the captor's country. In order to constitute a dereliction of the property acquired in the thing captured, the abandonment must be voluntary, and with intent to relinquish the right acquired. The origin of this principle is to be found in the Roman code, which distinguishes between a *voluntary* and *compulsory* abandonment of possession; the first changing the right of property, whilst the latter has no such effect.[1] It is applied to | the law p. 127

[1] *Just. Inst. L. 2. t. 1, sec. 46. 47.* Alia sane causa est earum rerum, quæ in tempestate levandæ navis causa ejiciuntur. Hæ enim dominorum permanent: quia palam est, eas non eo animo ejici, quod quis eas habere nolit, sed quo magis cum ipsa navi maris periculum effugiat. Qua de causa, si quis eas fluctibus expulsas, vel etiam in ipso mari nactus, lucrandi animo abstulerit, furtum committit. So also *D'Habreu*, in commenting on the 9th article of the French prize ordinance, (which prescribes that, if a captured vessel, not having been recaptured, is abandoned by the enemy, or if by storms or other accidents, it returns into the possession of French subjects, before having been carried into any enemy's port, it shall be restored to the former owner, if claimed within a year and a day, although the possession of the enemy may have continued more than twenty-four hours,) makes the following observation, 'Quoique l'article de l'ordonnance ne paroisse pas faire la différence entre un vaisseau abandonné par les ennemis, et celui qui l'a été par l'effet d'une tempête ou de quelque autre accident imprévu; il est néanmoins certain qu'il y en à quelqu'une. Nous n'entre-prendrons point ici de la faire sentir: outre que cela nous écarterait de notre objet, il n'est personne, tant soit peu versé dans la jurisprudence, qui ignore que l'abandon volontaire fait perdre la propriété, tout au contraire de celui qui est forcée.' *D'Habreu on Prizes, ch. 5. § 10. tom. 2,* p. 95. of M. Bonnemant's Translation.

of prize by the different elementary writers.[1] It was practically enforced in the case of the Lord Nelson,[2] and by this court in the case of the Mary Ford.[3] Striking the colours is to be deemed the real *deditio*, and the consummation of the capture.[4] So, also, the capture is held to be consummated where the prize is completely under the dominion of the captor, has no ability to resist, and no prospect of escape.[5] Here was no recapture
p. 128 by the enemy | crew, because no resistance nor escape; and the British master could clearly not have maintained a claim for salvage in the courts of his own country had the Paul Jones turned out to be a British privateer.

Mr. *Webster*, contra. This is a case of voluntary relinquishment of the prize; and even if it was produced by terror of a supposed enemy, that will not make it *involuntary*. The case of the Lord Nelson does not determine the present case; but Sir William Scott there puts the very case now before the court, and decides it by asking, 'Suppose, therefore, that after this voluntary abandonment, the ship had been met with by some French cruiser, and that by means of jury-masts, they had succeeded in carrying her into a French port; can there be any doubt that she would have been prize to the second captor?' In the case of the Ann, which was a question of jurisdiction in a revenue cause, the seizure being abandoned before adjudication, this court illustrate their opinion by analogy to the prize law, holding, that capture gives no authority to proceed to adjudication, if abandoned before judicial proceedings are commenced.[6] So, also, in the case of the Astrea, it was determined, that an interest acquired by possession is devested by the loss of possession, from the very nature of a title acquired in war.[7] The case of the Adventure is likewise in point.[8] There was no fraud on the part of the
p. 129 Paul Jones. She had a right to chase under any colours; | but she neither chased nor fired under enemy's colours: whilst the prize showed no colours, and therefore invited pursuit; and was found in the possession of her original British master, and therefore authorized detention. She was not *infra præsidia* whilst lying in Wheeler's Bay; but even supposing she had been, if she was afterwards abandoned by her original captor,

[1] *Bynkershoek, Q. J. Pub. ch.* 4. *p.* 35 of Du Ponceau's Translation, *Id. ch.* 5. *p.* 36. 2 *Azuni*, Part 2. ch. 4. art. 2. § 1. 3. 7. 2 *Woodeson*, 454. See also 2 *Burr.* 693. Goss *et al.* v. Withers. In that case, the true distinction on this subject is alluded to by Lord Mansfield, that by whatever length of time, or other circumstance the property in prizes is vested, so as to bar the former owner in case of recapture or sale, 'the instant the captor has got *possession*, no friend, no fellow-soldier, or ally, can take it from him; because it would be a *violation of his property*.' And it is in this sense must be understood what is repeated by so many writers from the civil law, *Quæ ex hostibus capiuntur*, STATIM *capientium fiunt*. An inchoate title immediately accrues as against any cruiser of the same nation or its allies in the war, which title cannot be devested but by a *voluntary* abandonment on the part of the first captor. 2 *Woodeson*, 455.

[2] *Edwards*, 79. [3] 3 *Dall.* 198. [4] 1 *Rob.* 195. The Rebeckah.
[5] 3 *Rob.* 246. The Edward and Mary. [6] 9 *Cranch*, 289.
[7] 1 *Wheat.* 125. [8] *Ib.* note (*f*).

the Paul Jones had a right to take possession. The prize master did not think it worth while to risk being taken prisoner, and therefore abandoned his prize.

Mr. *Jones* in reply. The case supposed by Sir William Scott, in delivering his judgment in the Lord Nelson, is of a voluntary abandonment, and not one produced by the application of force or terror. In the case of the Ann, this court, though *incidentally* describing the general doctrine, adhere to their accustomed accuracy and precision of language. 'A *voluntary* abandonment' is the phrase used by the learned judge, who delivered the opinion of the court; and he proceeds to state, 'It is not meant to assert that a tortious ouster of possession or fraudulent rescue or relinquishment after seizure, will devest the jurisdiction.' The precedent of the Astrea does not apply. In that case there was a capture and recapture, and a second recapture; but no question whether the abandonment by the first captors was voluntary or not. The case of the Adventure was not a question of derelict; but whether the belligerant may invest a neutral with his rights at sea, in fraud of the contingent right of recapture by the | other belligerant. The question here is not whether p. 130
fraud was used, but whether *force* was used. The prize crew supposed they were surrendering to British captors: but the Mary was not in a situation to be captured by a cruiser of the United States; she was not derelict, but lying in a roadstead, which is a *præsidium*, though not guarded by forts and castles.

February 14th.

Mr. Justice JOHNSON delivered the opinion of the court.

We are of opinion that the facts stated, in this appeal, make a clear case of tortious dispossession on the part of the Paul Jones. The privateer Cadet had, with great gallantry, captured the Mary, and been in possession of her part of a night and day. The prize was close in upon the American coast, and making for a port which was open before her. It was not until the superior sailing of the Paul Jones made it manifest that the prize must be cut off from this port, and until she had been repeatedly fired upon, that the prize crew abandoned her. There exists not a pretext in the case that this abandonment was voluntary, or would have taken place but for the hostile approach of the Paul Jones. Whether the *vis major* acted upon the force or the fears of the prize crew is immaterial, since actual dispossession ensued.

But it is argued that the Paul Jones showed American colours; the Mary ought not therefore to have feared her: the Mary showed no colours, she, therefore, invited pursuit; and, finally, that the Paul Jones found her in the actual possession of her | original master, and, therefore, p. 131
could not have done otherwise than detain her.

We think otherwise. It was more probable that an enemy would show *false* than *true* colours. The circumstance of the Mary standing in for a friendly shore, was less equivocal evidence of her character than the exhibition of colours; and, after boarding the Mary, and learning that she was a prize to the Cadet, it was the duty of the captor to have repaired the injury he had done, and, either by making signals, sending a boat on shore, or a message by the boat that did come off, to have recalled the prize crew of the Cadet. But, instead of this, she instantly mans the prize, bears away from the harbour, which was close under their lee, and, by carrying English colours until out of sight, completes the conviction of the prize crew that the re-capture was by an enemy.

We are of opinion that the decision of the circuit and district courts should be reversed; that the prize should be adjudged to the Cadet; and the case remanded for the assessment of reasonable damages in favour of the Cadet. But, considering that the prize arrived in safety, and probably in a more secure harbour than that for which she was sailing, when seized by the Paul Jones, (although it is certainly a case for damages,) we are of opinion the damages should be moderate.

Sentence reversed.[1]

The Ariadne.—Goddard et al. claimants.

(2 Wheaton, 143) 1817.

The sailing under the enemy's license constitutes, of itself, an act of illegality, which subjects the property to confiscation, without regard to the object of the voyage or the port of destination.

APPEAL from the circuit court for the district of Pennsylvania.

This vessel, belonging to citizens of the United States, and laden with a cargo of flour also belonging to citizens of the same, was captured on the 15th day of October, 1812, on a voyage from Alexandria to Cadiz, with a license or passport of protection from the British admiral, Sawyer.
p. 144 The vessel and cargo were restored in the district court; | but on appeal, sentence of condemnation was pronounced by the circuit court, from which sentence an appeal was entered to this court.

February 14th.

Mr. *G. Sullivan,* for the appellants and claimants, offered to read farther proof, taken under the standing rule of the court, (25th rule, Feb. term, 1816.)

Mr. *Woodward,* and Mr. *C. J. Ingersoll,* for the captors, denied the

[1] Mr. Justice STORY did not sit in this cause.

authority of the rule under which the farther proof was taken. They argued that the act of congress did not provide for taking depositions to be used as farther proof in prize causes, except where the course of prize practice authorizes it; that farther proof is never admissible, until the cause is heard on the original evidence.

[Mr. Chief Justice MARSHALL called on the claimant's counsel to show what facts the farther proof tended to establish, and stated, that if the case could be distinguished from the former determinations respecting licenses, a foundation would be laid for the admission of the depositions as farther proof.]

Mr. *Webster*, for the appellants and claimants, contended, that this case could be distinguished from those which had been decided. In the case of the Julia,[1] the court had said, 'We hold, that the sailing on a voyage under the license and passport of protection of the enemy, in furtherance of his | views or interests, constitutes such an act of illegality as subjects p. 145
the ship and cargo to confiscation as prize of war; and that the facts of the present case afford irrefragable evidence of such an act of illegality.' This proposition, as a doctrine of law, would be equally true, leaving out all that it contains relative to a license. A voyage prosecuted in furtherance of the enemy's interests is undoubtedly illegal, and it was on this illegality of the *voyage itself* that the judgment of the court proceeded. The court say they are satisfied from the *facts* that the voyage was illegal. In the case now before the court the captors insist, that the court shall shut out the *facts* connected with the voyage, and go merely on presumption. The Julia cannot be an authority for such a decision. The Aurora[2] was decided expressly on the grounds which had been before stated in the Julia, and carries the doctrine no farther. In the case of the Hiram,[3] no evidence was offered on the part of the claimants to repel the presumption arising from the license. That case then only decides, that from the possession of the license the court may presume, until the contrary appears, that the voyage was in furtherance of the enemy's objects.

In all these cases the court seems to have rested its decision on the ground that the voyages, in which the vessels were engaged, were, of themselves, illegal voyages, undertaken and prosecuted for the promotion of the enemy's interests; and that | this illegality was shown by the facts p. 146
which the cases disclosed. But it is not understood to have decided, that it would hear no proof to make out the innocence of the voyage, notwithstanding the unfavourable inferences which might be drawn from the possession of the license. In the present case such proof is offered, and the claimants are ready to show that the voyage originated in no intention to further, and from its nature could not further, the objects of

[1] 9 *Cranch*, 181. [2] 8 *Cranch*, 283. [3] 8 *Cranch*, 444. 1 *Wheat.* 440.

the enemy. It was a voyage from Baltimore to Cadiz, with flour, at a time when neither the *British* nor the *Spanish* armies drew supplies from that city. They expect to prove it to have been, in all respects, as innocent as a voyage from Baltimore to Boston, with a similar cargo. Upon this application for permission to give proof, and until the court should hear the proof, the only question will be, whether, in the most innocent voyage which can be imagined, the having such a license is, *per se*, cause of confiscation; and cannot, in any case, by any evidence, admit of explanation or excuse. On this point, the claimant's counsel wish to be heard, unless the court considers itself as having recently solemnly decided the precise question. We will contend, that although the possession of such a license might create a presumption of unlawful trade, yet, like presumptions in other cases, it is capable of being repelled by proof; and that the judgment of the court must rest, after all, on the real nature and object of the voyage, as disclosed by the facts connected with it, and not on the mere terms of the passport. In a case of this sort, the court
p. 147 will | not incline to hold itself bound by former decisions beyond their clear and manifest extent. No case appears to have gone so far as to prevent the court from hearing proof of the lawfulness of the voyage, independent of the license, or to have decided that such proof, when full and satisfactory, should not avoid confiscation.

Mr. *Woodward* and Mr. *Ingersoll*, on the other side, were stopped by the court.

Mr. Justice WASHINGTON delivered the opinion of the court.

The view of the court is, that this case cannot be distinguished from those already decided. It is alleged that the flour was not actually destined to the use of the enemy; but whether any part of it went to his use or not, is immaterial. It is, indeed, possible that Cadiz might have fallen without the aid of these supplies; and therefore, in fact, Great Britain and her ally may have been relieved, by these supplies, from the pressure of the war in that quarter. The court, however, in the cases alluded to, proceeded on a broader ground: all the judges who concurred in those decisions were of opinion, that the mere sailing under an enemy's license, without regard to the object of the voyage, or the port of destination, constituted, of itself, an act of illegality which subjected the property to confiscation. It was an attempt by one individual of a belligerant
p. 148 country to clothe himself with a neutral character | by the license of the other belligerant, and thus to separate himself from the common character of his own country.

Sentence affirmed.

The Fortuna.—Krause et al. claimants.

(2 Wheaton, 161) 1817.

A question of proprietary interest and concealment of papers. Farther proof ordered, open to both parties.

APPEAL from the circuit court for the district of North Carolina.

This ship, sailing under Russian colours, left Riga on the 2d of September, 1813, for London, where she arrived; and from thence sailed on the 18th of November, 1813, in ballast, on a voyage to the West-Indies; took a British convoy at Portsmouth, in England, and proceeded with it to Barbadoes, and thence to Jamaica. From thence she sailed to the Havanna, where she arrived on the 12th of February, 1814; took in a cargo of the produce of Cuba, and left the port of the Havanna on the 25th March, 1814, under protection of a British convoy bound to Bermuda. After parting with the convoy, she was captured on the 19th of April, 1814, in N. lat. 38, W. long. 60, by the private armed schooner Roger, and brought into Wilmington, N. C., for adjudication. The master and all the crew, except the mate and two seamen, were taken out and kept on board the privateer until the 14th of August, when they were sent in to be examined.

A claim was interposed by the master, for the ship, as the property of Martin Krause, of Riga, one of the house of trade of M. & I. Krause, of that place, | for 1520 boxes of sugar and 144 quintals of Campeachy wood, p. 162
as the property of M. & I. Krause. For 160 boxes of sugar, as the property of J. F. Muhlenbruck, as the master understood, 'a native of Germany, and of late usual abode at Hamburg,' and who went out in the vessel, and purchased and shipped the whole of the cargo. And for small portions of the cargo, as the property of the master, and of a Swedish captain, Steinmeitz.

There were found on board a certificate of the built of the ship in Finland; a passport or sea-brief to proceed to London, granted at Riga by the harbour master and commander of that place; a bill of sale of the ship from P. A. Severnon & Son, of Riga, to Martin Krause; and certificates of naturalization of the crew. The cargo was documented in the usual formal manner.

The prize-master, in his affidavit on delivering up the ship's papers, sworn to on the 7th of July, 1814, states, 'that the said papers were found in said ship at three different periods, and that on coming into his possession, or on discovery thereof, he proceeded with them forthwith, and without delay, to the admiralty office, &c., and that the last parcel of papers were, on the 8th of June last, being a considerable time after the arrival of the said ship, found concealed in a tin box, carefully let into an old piece of timber, to wit, part of the frame or belfrey of a vessel, by means of a mortice hole, which said mortice hole was covered with a piece of wood, in a way calculated to elude observation, and which said piece

p. 163 of timber was stowed away among the ship's firewood,' &c. | Certain papers were also found in the master's trunk after the ship's arrival.

In his examination, on the standing interrogatories, the master swore that he was employed and appointed by a Mr. Hoffengartner, who gave him possession of the vessel in London, in 1812; that the said Hoffengartner was then travelling; and died about March, 1813; but his place of abode, birth, and country, the master did not know. That Messrs. Bennet & Co., of London, gave him his instructions, and informed him that Martin Krause had directed them to fit out the ship and order her to the Havanna. That the ship had before gone by some other name, which he did not recollect. That a bill of sale of the ship was made to Martin Krause, by the person from whom the said Krause purchased, but whose name he did not recollect, nor the time when it was made, nor in the presence of what witnesses; and there was no engagement different from, or in addition to, the bill of sale. He assigned as his reasons for placing the papers in the piece of wood, that they were partly papers not belonging to the vessel, and partly private letters, and he did not wish to have them mixed with the ship's papers, as it might possibly create confusion, and that they might be put aside when boarded by any private armed vessels, and, if there should be a necessity, produced when called for.

The ship and cargo were condemned in he courts below, and the cause was brought by appeal to this court. |

p. 164 *February 15th.*

Mr. *Gaston*, for the appellants and claimants, argued, that the character of the vessel and cargo, as manifested by the original evidence, apart from the papers found concealed on board, was strictly neutral, and entitled the claimants to restitution; and that the national character was not altered by the papers thus found. That a concealment of papers is not cause of condemnation, when accounted for on reasonable grounds; and that even actual spoliation of papers is not *conclusive*, but only *presumptive* evidence of hostile interests. *Presumptio stabitur donec contraria probetur*, i. e. until the concealed papers are produced; the case of the Concordia [1] shows in what light the wise man, who presides in the English court of admiralty (although in general, sufficiently austere towards neutrals) considered a temporary concealment even of *material* papers; that he viewed it not as authorizing *farther proof* merely, but as entitling the party to immediate *restitution*. Still less is the master's fault, in this respect, to be visited, vindictively, on the owners, where there has been such gross misconduct on the part of the captors as in the present instance. They have violated the positive text of the president's instructions in taking the master, and a great majority of the crew out

[1] 1 *Rob.* 102, 103.

of the captured vessel, and keeping them on board the privateer, and in not delivering up the papers found on board until long after the vessel had reached the port where she was carried for adjudication.[1] The court can only animadvert upon such | misconduct by depriving the captors of p. 165
their spoil: at all events, this, together with the other circumstances of the case, entitles the claimants to the privilege of farther proof.

Mr. *Wirt*, contra, accounted for taking out the captured crew by the circumstance of the weakness of the privateer. The instructions require, not merely that the captors should send in the master and one or more of the principal persons belonging to the captured vessel for examination on the standing interrogatories, but they imply that the master should deliver up all papers; and his failing, in this case, to deliver up all the documents which were necessary to support the national character of the vessel and cargo, is sufficient to excuse the captors for a slight departure from the letter of instructions, whose spirit they have obeyed. But supposing it to be an irregularity, it is now become immaterial; and the only questions are, whether the property appears to be hostile on the original evidence; or, if its character be doubtful, whether the claimants have forfeited their privilege of farther proof. The rules of prize practice are, that if the captured property appears to be *hostile*, condemnation follows; but if it does not appear to be clearly *neutral*, restitution does not follow of course, but the burthen of proof is thrown upon the claimants to show it to be entitled to restitution: if they are unable to do this from the original evidence, farther proof may be ordered, unless excluded by the misconduct of the claimants. It is not sufficient that the ship and cargo | are documented by formal papers; the other circumstances, and p. 166
the nature of the case, may show that these are merely the cloaks of fraud; and the necessary simplicity of the prize proceedings forbids the court from seeking for evidence *aliunde*, unless there be reasonable grounds for doubt. Still less can a resort be had to extraneous testimony where the documents are neither regular nor supported by the examinations *in preparatorio*. Nor is a formal support of the documents by oaths sufficient, if the oral testimony is outweighed by the circumstances of the transaction.[2] A fraudulent concealment of papers is a substantive ground of condemnation. Neutrals are bound to show belligerant cruisers *all* their papers; and a court of prize is authorized to presume the worst, if there be two constructions, one of which accounts for the concealment, and the other does not. The case is deficient in nearly every one of the documents which the writers on public law, and the law of insurance require to show the neutral character of the ship and cargo.[3] Mere formal

[1] See the President's Instructions. 2 Wheaton, APPENDIX, Note II.
[2] The Eenroom, 2 *Rob.* 1. The Calypso, *Ib.* 154. The Rosalie and Betty, *Ib.* 343. The Odin, 1 *Rob.* 248. The Vigilantia, *Ib.* 6, 7.
[3] 1 *Marshall on Ins.* 406. a, Condy's ed.

papers are a dead letter, unless supported by oral testimony.[1] But the master is an insufficient witness to support even the imperfect documents found on board this ship, as his testimony is falsified, and is nullified by his fraudulent concealment of the papers. Nor is this a case of farther
p. 167 proof, which is | the privilege of honest ignorance, mistake, or negligence.[2] In such a case of concealment as the present, where the papers are extracted from the latebræ of the ship, there can be no certainty but what some of the documents are still suppressed, or have been spoliated ; and the reason of the rule which refuses farther proof applies with full force where the parties have shown themselves, by their misconduct, unfit to be trusted with an order for farther proof. The case is infected throughout with falsehood, and is analogous to that of the *St. Nicholas*, in all the machinery of fraud.[3]

Mr. *Hopkinson*, in reply. The instructions are imperative, and cannot be dispensed with by the captors. The excuse for the depriving the captured vessel of her crew is unfounded in fact ; and, if true, is not sufficient to justify the captors, because the master might have been left, and there is no authority to support the supposed discretion of the captors in this particular. The *dictum* of Marshall, as to the papers which ought to be found on board a neutral ship, is not in point ; he shows, in a treatise on a branch of municipal law, what papers the *insured* are bound to have on board, to prevent not merely condemnation but even detention, capture, or carrying in for adjudication ; all of which
p. 168 are perils within the policy, and, under some circumstances, | may entitle the insured to abandon. But the law of nations only requires a neutral ship to be navigated with such documents as are required by the local law of the country to which she belongs, and the property of the cargo to be proved by the usual papers which the general usage of the commercial world has made necessary : even the want of these is not a substantive ground of condemnation, but may be explained by the claimants, if susceptible of explanation. But the burthen of proof is not thrown on them in the case of a lawful voyage in a ship, and with a cargo, documented as neutral. In such a case every favourable presumption is to be indulged ; and even the unfavourable presumption arising from spoliation, or concealment of papers, ceases when the nature of the documents destroyed or concealed is made to appear. There may be a concealment in *fact*, which is not a concealment in *law*. There may be an innocent concealment ; and here is no evidence of a fraudulent concealment, or of spoliation. The papers, when discovered, must answer for themselves. If an immoral play, or a meretricious novel had been found

[1] The Juno, 2 *Rob.* 101. The Odin, 1 *Rob.* 248.

[2] 1 *Wheat.* Appendix, Note II, p. 504., and the authorities there cited. Livingston *et al.* v. The Maryland Ins. Co., 7 *Cranch*, 545.

[3] 1 *Wheat.* 417.

concealed on board, it would indeed have argued bad taste and want of morals in the master, but could no more enure to condemnation than a volume of Plutarch or the '*British Spy*.'

March 17th.

Mr. Justice JOHNSON delivered the opinion of the court, ordering this cause to farther proof, open to both parties.

ORDER.—It is ordered, in this cause, that both | parties have liberty p. 169
to produce farther proof; that all examinations of witnesses be taken under commission according to the rule of this court; that original letters and documents be, in all cases, produced, or a sufficient reason assigned for not producing such originals. And that the captors have leave to inspect letter books and books of account relative to this adventure wherever they require it.

The Bothnea and the Jahnstoff.

(2 Wheaton, 169) 1817.

A question of collusive capture. Condemnation to the captors.

APPEAL from the circuit court for the district of Massachusetts.

From the papers found on board these vessels, and the preparatory examinations in the court below, it appeared that they were foreign vessels, having on board, as was admitted on all sides, false and simulated Swedish papers. They both sailed from Halifax, N. S., about the 24th of November, 1813, laden with cargoes of British manufactured goods, destined for the United States; and, on the same day, were captured near the Ragged Islands, either really or collusively, by the privateer Washington, of $24\frac{30}{95}$ tons, one gun and fifteen men, belonging to Portland, | p. 170
in the District of Maine, and commanded by William Malcomb. They were taken in sight of each other; the Jahnstoff first, within about three hours, and the Bothnea, within about nine hours after leaving Halifax. At the time of the capture, there were on board the Bothnea seven persons, and on board of the Jahnstoff five persons, composing their respective crews, and one American passenger. The whole of the crews were taken from each vessel, and landed in a boat at Ragged Islands. The American passengers were retained on board, and under the superintendence of prize-masters and crews. The Bothnea was conducted into Salem, and the Jahnstoff into Plymouth, in the district of Massachusetts. Immediately on their arrival they were seized by the collectors of those ports, for an alleged violation of the non-importation act. Prize proceedings were also commenced by the captors against both vessels, before the district court of Massachusetts. The American passengers

were examined on the standing interrogatories, and the papers found on board deposited in court by the prize-masters. The papers found on board the Bothnea were the Swedish simulated papers. Two bills of lading of the cargo, dated the 23d of November, 1813, purporting that the whole cargo was shipped by John Moody & Company, merchants, of Halifax, for New-London, consigned *to order*. A clearance from Halifax, dated on the same day. A British license from Sir John Sherbrooke, governor, &c., dated on the 9th of November, 1813, authorizing John Moody and others to export in any vessel, not belonging to France, to
p. 171 any port in the | United States, any British goods, on British or American account, which license was to continue in force for two months. And two letters dated at Halifax on the 23d November, 1813; one purporting to be addressed to the consignee of the cargo, the other to be addressed to the master of the Bothnea. These letters are as follows: 'Halifax, November 23d, 1813. Dear Sir, We now only enclose you a bill of lading of the cargo shipped on our joint account per the Bothnea, agreeable to the memorandum left with us by Vandervelt, when last here. The invoices we forwarded in duplicate, one by P. Jones, and the other by Schonesburg, which you will have received before this. Z. has our particular instructions how to proceed when in with the squadron. We have settled for A.'s share of the compensation. B. 2. will pay his. We have fixed on 200 dollars, exclusive of the freight, which we have also arranged for. Most sincerely do we wish this speculation to succeed, at the same time request your earliest advice how to proceed with the next. Do not trust too much paper. We have directed Z., in case of meeting with an American cruiser, to destroy all. We are very truly your friends and obedient servants, John Moody & Company.'

'Halifax, Nov. 23d, 1813. Captain J*. K*., Schooner Bothnea.—Sir, We hand you herewith sundry enclosures respecting the cargo of the Bothnea, to your most particular care. You will perceive the necessity of using every possible caution. We are only apprehensive of Shaving Mills. You will of course secrete every thing respecting the transaction. |
p. 172 In case of British interruption we must recommend your being well assured that there is no deception, as you must be aware of the facility with which American cruisers may pass for English. The invoices of the goods are already forwarded. You will make the best of your way to N**. When in with any of the B. B. squadron, come forward with your Ex. Li. which will safely pass you, and then nothing will remain but activity and despatch in getting the goods on shore. We should not have embarked ourselves so largely in this concern, but from the ease with which dry goods can be smuggled into those places if properly managed. The bill of lading is to order, you will, therefore, receive instructions from our friends A. 1, and B. 2. We expect your best place will be to

lay off under the protection of H. M. ships, and deliver the cargo in boats and lighters without proceeding further ; and as our friends are already advised on the subject, no doubt every necessary step will be taken. Should, however, any unexpected casualty happen, we recommend your getting out of the way, as we would rather the whole should be sacrificed than any mischief happen to ——. But, above all, keep out of sight your Ex. Li. clearance and this letter. Do not confide too much. If you have any suspicions destroy all at once, and after committing this to memory be sure to put it perfectly out of danger. As to the return cargo we need not say any thing on the subject, having the fullest confidence that a voyage to St. Barts may be profitably effected with *certain* articles ; flour out of the question, unless rye. B. | No. 2, will pay you the com- p. 173
pensation agreed, exclusive of the freight we have allowed. A's proportion we will settle with our own. If it is possible to obtain convoy we will, but it is doubtful. We are your friends and humble servants, John Moody & Co. P. S. Do not write, for fear of accidents. Let your communications be verbal.'—The papers on board of the Jahnstoff were the Swedish simulated papers. A British license, and clearance, of the same date and purport as in the Bothnea. Two bills of lading of the cargo, dated the 23d November, 1813, on the same account, destination, and consignment as in the case of the Bothnea. And two letters dated at Halifax on the same day, one addressed to Messrs. B. 2, and A. 1, at New London ; and the other to the master of the Jahnstoff. The first of these letters is as follows : ' Halifax, Nov. 23d, 1813. Dear Sir, We now enclose you a bill of lading of the cargo shipped on our joint account per the brig Jahnstoff, agreeable to the memorandum left with us by Vandervelt, when last here. The invoice we forwarded in duplicate, one by P. Jones, and the other by Schonesburg which you will have received before this. Z. has our particular instructions how to proceed when in with the Squad. We have settled for A.'s share of the compensation ; B. No. 2, will pay his. We have fixed 200 dollars, exclusive of the freight, which we have also arranged for. Most sincerely do we wish this speculation to succeed. At same time request your earliest advice how to proceed with the next. Do not trust too much paper. We have directed Z., in case of meeting | with an American cruiser, to destroy all.' The other letter is an exact p. 174
transcript of that addressed to the master of the Bothnea, except that the direction is varied.

At the hearing in the district court, a claim was interposed by the District Attorney in behalf of the United States, and of the collector, praying a condemnation to them, upon the ground of a collusive capture and fraudulent breach of the non-importation act. That court dismissed the captor's libel, and condemned the vessels and their cargoes to the United States ; from which sentence an appeal was interposed to the

circuit court, which court affirmed the condemnation, and the causes were brought to this court by appeal. Farther proof was ordered at the last term, and the causes again came on for hearing at the present term upon the farther proof exhibited by both parties, and directed to explain the several points indicated by the court as grounds of doubt on the original evidence.[1] Under the commissions taken out to examine witnesses, the following interrogatories were exhibited on the part of the captors. Have not some of the privateers, fitted out in the eastern ports, during the war of the revolution and the late war, been of very small burthen? Was it not usual for these privateers, armed sometimes with one carriage gun only, to proceed coastwise upon short cruises, and did they not capture prizes of great value? Was it not their practice to
p. 175 frequent the ports of the District of Maine and of the province of | Nova Scotia, for the purpose of running out occasionally, capturing the British commerce bound in and out of Halifax and other enemy's ports, and were they not often successful? Did it not often happen that the crews of the vessels, captured by them, were put ashore by the privateers, instead of being brought in as prisoners? Has it not been the practice for sea-faring persons in the District of Maine to become owners of such privateers, and to go in them on short cruises? Did it frequently happen during the late war that unarmed vessels, under neutral or British colours, sailed without convoy from the port of Halifax, either to New-London, Long-Island Sound, or elsewhere? And, on the part of the United States, the following: Was it not the usual custom, during the late war, for the owners of privateers to stipulate with the officers and crew, that the latter should receive one moiety or some other definite proportion of the proceeds of all prizes? Were there any cases where the crews were engaged to serve on monthly wages, without participating in the prizes? Was it not usual for privateers to bring in the prisoners captured by them? What was the usual and adequate crew and armament of a privateer of about 25 tons burthen, intended for a cruise from the eastern ports, in the Bay of Fundy and along the coasts of Nova Scotia? Together with other interrogatories tending to show, or to negative, collusion between the owners of the captured vessels and the privateer by which the capture was made. The answers to these interrogatories, by the various witnesses
p. 176 examined, were contradictory and inconsistent, | and it would be obviously impossible to present any intelligible abstract of their testimony without extending the case to an inconvenient length. But, among other circumstances, it was proved that nine out of fifteen of the prize crew were joint owners.

February 20th.

The causes were argued on the farther proof by Mr. *Harper* and

[1] See 1 Wheaton, 408.

Mr. *Winder*, for the appellants and captors, and by the *Attorney-General*, for the United States.

March 4th.

Mr. Justice JOHNSON delivered the opinion of the court.

After duly weighing the evidence in these cases, a majority of the court are of opinion that the vessel and cargo must be adjudged to the owners, officers, and crew of the capturing privateer. Independently of the act of landing the entire crews of the captured vessels, there was nothing in the case which necessarily led to suspicion. And this is explained on a ground that is very plausible, to wit, that having a course to run which swarmed with enemy's vessels, their intention was to personate the original crew, and pass off the prizes on the approach of an enemy, under their original character. It is not at all impossible that nothing but this *ruse de guerre* may have been in contemplation of the crew. There is, indeed, something in it peculiarly characteristic, when we consider the spirit of adventure, and great mental resources which distinguish the people of whom the crew was composed. It is to | be p. 177
regretted that this talent for enterprise had not been always more happily applied than it was in the adventure of the Jahnstoff and Bothnea. These vessels had both been employed in transporting provisions from New Haven to Halifax, and were now returning with cargoes of dry goods to be smuggled into the United States in the vicinity of the same place. The documentary evidence shows an intimate correspondence between the shippers at Halifax and some persons resident in the United States. But who they were must remain unknown, as the merchants in Halifax have, in their examination, refused to betray them. That the voyages of these vessels was loaded with infamy no one pretends to deny. The reasoning of the courts below is unanswerable on this point. But the majority of this court are of opinion that the evidence is not sufficient to fasten on the captors a participation in the fraud. The whole may have been, for aught we know, a combination of machinery, the result of the most consummate art. It is certainly true that, in one view of the case, every thing may be attributed to artifice, in another to natural conduct. Scarcely a feature of it may not be indifferently pronounced the lineament of guilt or innocence. In such a case a court of justice has no alternative. It must pronounce in favour of innocence.

The decrees below will, therefore, be reversed, and the vessels and cargoes adjudged to the captors.

Mr. Justice STORY gave no opinion.

Sentence reversed.

The Pizarro.—Hibberson and Yonge, claimants.

(2 Wheaton, 227) 1817.

If the court below deny an order for farther proof when it ought to be granted, or allow it when it ought to be denied, and the objection is taken by the party, and appears on the record, the appellate court can administer the proper relief.

But, if evidence in the nature of farther proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent, and the irregularity is waived.

Concealment, or spoliation of papers, is not, *per se*, a sufficient ground for condemnation in a prize court. It is calculated to excite the vigilance and justify the suspicions of the court; but is open to explanation: and if the party, in the first instance fairly, frankly, and satisfactorily explains it, he is deprived of no right to which he is otherwise entitled. If, on the contrary, the spoliation is unexplained, or the explanation is unsatisfactory; if the cause labour under heavy suspicions, or gross prevarications; farther proof is denied, and condemnation ensues from defects in the evidence which the party is not permitted to supply.

Under the Spanish treaty of 1795, stipulating that free ships shall make free goods, the want of such a sea letter or passport, or such certificates as are described in the 17th article, is not a substantive ground of condemnation. It only authorizes capture and sending in for adjudication, and the proprietary interest in the ship may be proved by other equivalent testimony. But if, upon the original evidence, the cause appears extremely doubtful and suspicious, and farther proof is necessary, the grant or denial of it rests on the same general rules which govern the discretion of prize courts in other cases.

The term 'subjects,' in the 15th article, when applied to persons owing allegiance to Spain, must be construed in the same sense as the term 'citizens,' or 'inhabitants,' when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the Spanish dominions. |

p. 228 The Spanish character of the *ship* being ascertained, the proprietary interest of the *cargo* cannot be inquired into, unless so far as to ascertain that it does not belong to citizens of the United States, whose property, engaged in trade with the enemy, is not protected by the treaty.

APPEAL from the circuit court of the district of Georgia.

The ship Pizarro, under Spanish colours, was captured on the 23d of July, 1814, by the private armed schooner Midas, Alexander Thompson, commander, on a voyage from Liverpool to Amelia Island, and brought into the port of Savannah for adjudication. Prize proceedings were instituted in the district court of Georgia against the ship and cargo, and a claim was duly interposed by Messrs. Hibberson and Yonge, merchants, of Fernandina, Amelia Island, for the ship and cargo, as their sole and exclusive property. Upon the final hearing in the district court, the ship and cargo were decreed to be restored, and this decree was, upon an appeal to the circuit court, affirmed; and from the decree of the circuit court the cause was brought by appeal to this court.

It appears from the evidence, that during the voyage a package, containing papers respecting the cargo, directed to Messrs. Hibberson and Yonge, was thrown overboard by the advice and assent of the master

and supercargo. The reason alleged for this proceeding is, that they were then chased by a schooner, which they supposed to be a Carthaginian privateer. The ship's documents, however, were | retained, in which her p. 229
Spanish character is distinctly asserted.

These documents were as follows: 1. A certificate of the Spanish consul at Liverpool, dated the 11th of September, 1813, certifying that the Pizarro was a Spanish ship, bound to Corunna. 2. A certificate from the same, of the same date, that Messrs. Hughes and Duncan had shipped 250 tons of salt on board the Pizarro for Corunna, consigned to Messrs. Hibberson and Yonge. 3. A certificate of health, dated at Fernandina, the 20th of December, 1813. 4. A letter from Messrs. Hibberson and Yonge, of the 10th January, 1814, to J. Walton, the navigator or sea pilot, ordering him to sail to Liverpool. 5. A bill of lading, signed by Martinez, the master, for the outward cargo. 6. The affidavit of Messrs. Hibberson and Yonge, that they had shipped the same cargo on their own account, consigned to Messrs. Hughes and Duncan, &c. 7. The shipping articles from Amelia Island to St. Augustine, or any *other* port in Europe, and back, dated the 11th of January, 1814. 8. Shipping articles from Liverpool to St. Augustine, and back to Liverpool, without a date. 9. A license from the governor of East Florida, authorizing Messrs. Hibberson and Yonge to buy a vessel in the United States, and the copy of a bill of sale from Messrs. S. and W. Hale, of New-Hampshire, by their agent Kimbell, dated the 24th of February, 1813, together with an order of the governor, of the 6th of March, 1813, naturalizing the ship, or permitting her to sail under Spanish colours. |

In the district court, the cause was heard not merely upon the ship's p. 230
papers, and the testimony of the master and supercargo, (who were twice examined in open court,) but the claimants were also permitted to introduce new proofs and testimony in support of their claim, without any order for farther proof.

February 27th.

Mr. *Winder*, for the appellants and captors. 1. The proprietary interest in the claimants is not proved. 2. They are excluded from the benefit of farther proof by the spoliation of papers. The court below made no order for farther proof; yet it seems to have been admitted and considered by that court, and has crept into the transcript of the record. This was an irregularity, which will be corrected by the appellate tribunal, since the case on the original evidence was free from doubt or difficulty, and condemnation ought to have ensued. The spoliation of papers is not satisfactorily accounted for by the master and supercargo, who have prevaricated in their examinations; and the spoliation being unexplained, inevitably leads to the exclusion of farther proof, and,

consequently, to condemnation. In the case of the *Two Brothers*,[1] spoliation of papers, not being avowed with sufficient frankness by the master, was held to destroy his credit; and the defect of proof thereby induced, together with other circumstances, was deemed a cause of
p. 231 condemnation. In the present | case, *all* the documents relative to the cargo were thrown overboard, and the excuse is the same which was rejected by the English court of admiralty in the *Rising Sun*. Destroying the papers which might show the Spanish character of the *cargo* could not diminish the danger of capture by Carthaginian privateers, since the *ship* would still appear to be Spanish, and this, together with the want of documentary evidence as to the cargo, would involve both in the same fate. This explanation of the suppression of the papers is, therefore, weak and futile, and such as cannot relieve the parties from the imputation of *mala fides*. 3. The claimants contend, that the cargo is exempt from confiscation by the Spanish treaty of 1795, which recognises the rule, that free ships make free goods.[2] But the term 'subjects,' in the

[1] 1 *Rob.* 131. See also the Polly, 2 *Rob.* 361. The Rising Sun, 2 *Rob.* 104. In this last case the master guilty of the spoliation was excluded from farther proof as to his share of the cargo.

[2] ARTICLE XV.—It shall be lawful for all and singular the subjects of his Catholic Majesty, and the citizens, people, and inhabitants of the said United States, to sail with their ships, with all manner of liberty and security, no distinction being made who are the proprietors of the merchandises laden thereon, from any port to the places of those who now are, or hereafter shall be, at enmity with his Catholic Majesty or the United States. It shall be likewise lawful for the subjects and inhabitants aforesaid, to sail with the ships and merchandises aforementioned, and to trade with the same liberty and security from the places, ports, and havens, of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned, to neutral places, but also from one place belonging to an enemy, to another place belonging to an enemy, whether they be under the jurisdiction of the same prince, or under several; and it is hereby stipulated, that free ships shall also give freedom to goods, and that every thing shall be deemed free and exempt which shall be found on board the ships belonging to the subjects of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either: contraband goods being always excepted. It is also agreed, that the same liberty be extended to

ARTICULO XV. Se permitirá à todos y à cada uno de los súbditos de S. M. Católica, y à los ciudadanos pueblos y habitantes de dichos Estados, que puedan navegar con sus embarcaciones con toda libertad y seguridad, sin que haya la menor excepcion por este respecto, aunque los propietarios de las mercaderías cargadas en las referidas embarcaciones vengan del puerto que quieran, y las traygan destinadas à qualquiera plaza de una potencia actualmente enemiga ó que lo sea despues, así de S. M. Católica como de los Estados Unidos. Se permitirá igualmente à los súbditos y habitantes mencionados navegar con sus buques y mercaderías, y freqüentar con igual libertad y seguridad las plazas y puertos de las potencias enemigas de las partes contratantes, ó de una de ellas sin oposicion ú obstáculo, y de comerciar no solo desde los puertos de dicho enemigo à un puerto neutro directamente, si no tambien desde uno enemigo à otro tal, bien se encuentre baxo su jurisdicion, ó baxo la de muchos; y se estipula tambien por el presente tratado que los buques libres asegurarán igualmente la libertad de las mercaderias, y que se juzgarán libres todos los efectos que se hallasen à bordo de los buques que perteneciesen à los súbditos de una de las partes contratantes, aun quando el cargamento por entero ó parte de él fuese de los enemigos de una de las dos, bien entendido sin embargo que el

15th | and 16th articles, must be understood of subjects who owe a per- p. 232
manent allegiance to the crown of Spain, | not of mere domiciled merchants, p. 233

persons who are on board a free ship, so that although they be enemies to either party, they shall not be made prisoners or taken out of that free ship, unless they are soldiers, and in actual service of the enemies.

ARTICLE XVI.—This liberty of navigation and commerce shall extend to all kinds of merchandises, excepting those only which are distinguished by the name of contraband: and under this name of contraband, or prohibited goods, shall be comprehended arms, great guns, bombs, with the fusees, and the other things belonging to them, cannon-ball, gunpowder, match, pikes, swords, lances, spears, halberds, mortars, petards, grenades, saltpetre, musquets, musquet-ball, bucklers, helmets, breast-plates, coats of mail, and the like kinds of arms, proper for arming soldiers, musquet-rests, belts, horses with their furniture, and all other warlike instruments whatever. These merchandises which follow shall not be reckoned among contraband or prohibited goods: That is to say, all sorts of cloths, and all other manufactures woven of any wool, flax, silk, cotton, or any other materials whatever; all kinds of wearing apparel, together with all species whereof they are used to be made; gold and silver, as well coined as uncoined, tin, iron, latten, copper, brass, coals; as also wheat, barley and oats, and any other kind of corn and pulse; tobacco, and likewise all manner of spices, salted and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugars, and all sorts of salts: and, in general, all provisions which serve for the sustenance of life: furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail-cloths, anchors, and any parts of anchors, also ships' masts, planks and wood of all kind, and all other things proper either for building or repairing ships, and all other goods whatever, which have not been worked into the form of any instrument prepared for war, by land or by sea, shall not be reputed contraband, much less, such as have been already wrought and made up for any other use; all which shall be wholly reckoned

contrabando se exceptua siempre. Se ha convenido así mismo que la propia libertad gozarán los sugetos que pudiesen encontrarse à bordo del buque libre, aun quando fuesen enemigos de una de las dos partes contratantes; y por lo tanto no se podrá hacerlos prisioneros ni separarlos de dichos buques à ménos que no tengan la qualidad de militares, y esto hallandose en aquella sazon empleados en el servicio del enemigo.

ARTICULO XVI. Esta libertad de navegacion y de comercio debe extenderse à toda especie de mercaderías exceptuando solo las que se comprehenden baxo nombre de contrabando, ó de mercaderias prohibidas, quales son las armas, canones, bombas con sus mechas, y demas cosas pertenecientes à lo mismo, balas, pólvora, mechas, picas, espadas, lanzas, dardos, alabardas, morteros, petardos, granadas, salitre, fusiles, balas, escudos, casquetes, corazas, cotas de malla, y otras armas de esta especie propias para armar á los soldados, portamosquetes, bandoleras, caballos con sus armas y otros instrumentos de guerra sean los que fueren. Pero los generos y mercaderías que se nombrarán ahora, no se comprehenderán entre los de contrabando ó cosas prohibidas, à saber: toda especie de panos y qualesquiera otras telas de lana, lino, seda, algodon, ù otras qualesquiera materias, toda especie de vestidos con las telas de que se acostumbrad hacer, el oro y la plata labrada en moneda ó no, el estano, hierro, laton, cobre, bronce, carbon, del mismo modo que la cevada, el trigo, la avena, y qualquiera otro género de legumbres. El tabaco y toda la especería, carne salada y ahumada, pescado salado, queso y manteca, cerveza, aceytes, vinos, azúcar, y toda especie de sal, y en general todo género de provisiones que sirvan para el sustento de la vida. Ademas toda especie de algodon, cánamo, lino, alquitran, pez, cuerdas, cables, velas, telas para velas, áncoras, y partes de que se componen. Mástites, tablas, maderas de todas especies, y qualesquiera otras cosas que sirvan para la construccion y reparacion de los buques, y otras qualesquiera materias que no tienen la forma de un instrumento preparado para la guerra por tierra ó por mar, no serán reputadas de contrabando, y ménos las que están ya preparadas para ostros usos. Todas las cosas que se acaban de nombrar

such as the claimants. A vessel found without the documents required |
p. 234 by the 17th article is presumptively in the same situation as if she were

among free goods: As likewise all other merchandises and things which are not comprehended and particularly mentioned in the foregoing enumeration of contraband goods: So that they may be transported and carried in the freest manner by the subjects of both parties, even to places belonging to an enemy, such towns or places being only excepted as are at that time besieged, blocked up, or invested. And except the cases in which any ship of war or squadron shall, in consequence of storms or other accidents at sea, be under the necessity of taking the cargo of any trading vessel or vessels, in which case they may stop the said vessel or vessels, and furnish themselves with necessaries, giving a receipt, in order that the power to whom the said ship of war belongs, may pay for the articles so taken, according to the price thereof, at the port to which they may appear to have been destined by the ship's papers: and the two contracting parties engage, that the vessels shall not be detained longer than may be absolutely necessary for their said ships to supply themselves with necessaries: That they will immediately pay the value of the receipts, and indemnify the proprietor for all losses which he may have sustained in consequence of such transaction.

ARTICLE XVII. To the end, that all manner of dissentions and quarrels may be avoided and prevented on one side and the other, it is agreed, that in case either of the parties hereto should be engaged in a war, the ships and vessels belonging to the subjects or people of the other party must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties, which passport shall be made out and granted according to the form annexed to this treaty. They shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year.

It is likewise agreed, that such ships being laden, are to be provided not only with passports as above mentioned, but also with certificates, containing the several particulars of the cargo, the place whence the ship sailed, that so it

deben ser comprehendidas entre las mercaderías libres, lo mismo que todas las demas mercaderías y efectos que no están comprehendidos y nombrados expresamente en la enumeracion de los géneros de contrabando, de manera que podrán ser transportados y conducidos con la mayor libertad por los súbditos de las dos partes contratantes á las plazas enemigas, exceptuando sin embargo las que se hallasen en la actualidad sitiadas, bloqueadas, ó embestidas, y los casos en que algun buque de guerra ó esquadra que por efecto de averías ú otras causas se halle en necesidad de tomar los efectos que conduzca el buque ó buques de comercio, pues en tal caso podrá detenerlos para aprovisionarse, y dar un recibo para que la potencia cuyo sea el buque que tome los efectos, los pague segun el valor que tendrian en el puerto adonde se dirigiese el propietario, segun lo expresen sus cartas de navegacion: obligandose las dos partes contratantes á no detener los buques mas de lo que sea absolutamente necesario paro aprovisionarse, pagar inmediatamente los recibos, é indemnizar todos los danos que sufra el proprietario á conseqüencia de semejante suceso.

'ARTICULO XVII. A fin de evitar entre ambas patres toda especie de disputas y quejas, se ha convenido que en el caso de que una de las dos potencias se hallase empenada en una guerra, los buques y bastimentos pertenecientes á los súbditos ó pueblos de la otra, deberán llevar consigo patentes de mar ó pasaportes que expresen el nombre, la propiedad, y el porte del buque, como tambien el nombre y morada de su dueno y comandante de dicho buque, para que de este modo conste que pertenece real y verdaderamente á los súbditos de una de las dos partes contratantes; y que dichos pasaportes deberán expedirse segun el modelo adjunto al presente tratado. Todos los anos deberán renovarse estos pasaportes en el caso de que el buque vuelva á su pais en el espacio de un ano.

'Igualmente se ha conveindo en que los buques mencionados arriba, si estuviesen cargados, deberán llevar no solo los pasaportes sino tambien certificados que contengan el pormenor del cargamento, el lugar de donde ha salido el

without any documents, | and no equivalent proof can be admitted, p. 235
because the pre-existing law of nations, and the practice of | prize courts p. 236
under that law, though they exempt neutral property from confiscation,
refuse farther proof where there has been spoliation of papers | *mala fide*, p. 237
and condemn the property as enemy's. So, also, in this case, the Spanish character of the ship cannot be established, because the claimants have forfeited the privilege of farther proof by the misconduct of their own agents, and, consequently, cannot furnish the equivalent testimony required by the 17th article. The justifiable inference is, that the property in the ship and cargo belongs to the enemy, or to citizens of the United States trading | with the enemy, which it will not be pretended is protected p. 238
by the treaty.

Mr. *Key* and the *Attorney-General* for the respondents and claimants.

1. Even the total want of papers is not a substantive ground of con-

may be known whether any forbidden or contraband goods be on board the same: which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form: And if any one shall think it fit or advisable to express in the said certificates the person to whom the goods on board belong, he may freely do so: Without which requisites they may be sent to one of the ports of the other contracting party, and adjudged by the competent tribunal, according to what is above set forth, that all the circumstances of this omission having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property by testimony entirely equivalent.

'ARTICLE XVIII. If the ships of the said subjects, people, or inhabitants, of either of the parties, shall be met with, either sailing along the coasts or on the high seas, by any ship of war of the other, or by any privateer, the said ship of war or privateer, for the avoiding of any disorder, shall remain out of cannon shot, and may send their boats a-board the merchant ship, which they shall so meet with, and may enter her to number of two or three men only, to whom the master or commander of such ship or vessel shall exhibit his passports, concerning the property of the ship, made out according to the form inserted in this present treaty, and the ship when she shall have showed such passport, shall be free and at liberty to pursue her voyage, so as it shall not be lawful to molest or give her chace in any manner, or force her to quit her intended course.'

buque, y la declaracion de las mercaderías de contrabando que pudiesen hallarse a bordo, cuyos certificados deberán expedirse en la forma acostumbrada por los oficiales empleados en el lugar de donde el navio se hiciese á la vela, y si se juzgase útil y prudente expresar en dichos pasaportes la persona propietaria de las mercaderías se podrá hacer libremente, sin cuyos requisitos será conducido á uno de los puertos de la potencia respectiva, y juzgado por el tribunal competente, con arreglo á lo arriba dicho, para que exâminadas bien las circunstancias de su falta, sea condenado por de buena presa si no satisfaciese legalmente con los testimonios equivalentes en un todo.

'ARTICULO XVIII. Quando un buque perteneciente á los dichos súbditos pueblos y habitantes de una de las dos partes fuese encontrado navegando á lo largo de la costa ó en plena mar por un buque de guerra de la otra ó por un corsario, dicho buque de guerra ó corsario, á fin de evitar todo desórden, se mantendrá fuera del tiro de canon, y podrá enviar su chalupa á bordo del buque mercante, hacer entrar en él dos ó tres hombres á los quales ensenará el patron ó comandante del buque su pasaporte y demas documentos, que deberán ser conformes á lo prevenido en el presente tratado, y probará la propiedad del buque, y despues de haber exhibido semejante pasaporte y documentos, se les dexará seguir libremente su viage, sin que les sea lícito el molestarle ni procurar de modo alguno darle caza, ú obligarle á dexar el rumbo que seguia.'

demnation: it may be explained, as Sir William Scott[1] observes in the *Betsey*, alluding to the ancient French law. 2. Nor is the spoliation of papers conclusive to exclude farther proof, and never has been so held by any tribunal whose decisions this court will respect.[2] In this case the stupid and artless manner in which the agents of the owners acted is a proof that the latter did not participate in, nor can they be made penally responsible for, the misconduct of the former. 3. If the owner of the ship was a domiciled subject of Spain, the ship, and, consequently, the cargo, is entitled to protection under the treaty. Commercial domicil stamps a national character for every purpose in the view of a court of prize; and if the operation of the treaty were confined to Spanish *subjects* (properly so called,) while it is extended to all persons inhabiting the United States, it would be unaccountably deficient in reciprocity. What fortifies the contrary construction is, that the term *subjects* is several times used indiscriminately in the treaty to signify the inhabitants of both countries. The purpose for which the documents prescribed by the treaty are required shows that a merely formal defect only authorizes
p. 239 detention and sending in for | adjudication, and if 'equivalent testimony' is produced, restitution must follow, though the captors are exempt from costs and damages. *Equivalent testimony* is that which satisfactorily proves the same thing as that in which there was defective proof before; and the proof we have produced is testimony more than equivalent. The form of passport alluded to in the 17th article is not annexed to the treaty, nor is it to be found in the department of state. The Spaniards have relied on the good faith with which this country has always fulfilled its engagements; they have neglected the form, and relied on the spirit of the stipulation. The papers produced are, therefore, equivalent to a formal passport; and there is no rule by which they can be excluded, as there was no attending circumstance of fraud in the destruction of the original documents, and, consequently, the case is unaffected by that *mala fides* which precludes explanation from extrinsic testimony.

March 5th.

Mr. Justice STORY delivered the opinion of the court, and after stating the facts, proceeded as follows:

A preliminary objection has been taken in the argument at bar to the regularity of the proceedings in this cause, and it is urged, with great earnestness and force, that the farther proof was not admissible except under an explicit order of the court for this purpose; and that the conduct of the master and supercargo in the suppression of the documents of the cargo,
p. 240 and in prevaricating in their examination, has | justly forfeited the claim which the owners might otherwise have to introduce the farther proof.

[1] 1 *Rob.* 84. [2] The Two Brothers, 1 *Rob.* 113. The Rising Sun, 2 *Rob.* 89.

The proceedings in the district court were certainly very irregular; and this court cannot but regret that so many deviations from the correct prize practice should have occurred at so late a period of the war. The ship's papers ought to have been brought into court, and verified, on oath, by the captors, and the examinations of the captured crew ought to have been taken upon the standing interrogatories, and not *viva voce* in open court. Nor should the captured crew have been permitted to be re-examined in court. They are bound to declare the whole truth upon their first examination; and if they then fraudulently suppress any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give colour to their former statements after counsel has been taken, and they know the pressure of the cause. Public policy and justice equally point out the necessity of an inflexible adherence to this rule.

It is upon the ship's papers, and the examinations thus taken in preparatory, that the cause ought, in the first instance, to be heard in the district court; and upon such hearing it is to judge whether the cause be of such doubt as to require farther proof; and if so, whether the claimant has entitled himself to the benefit of introducing it. If the court should deny such order when it ought to be granted, or allow it when it ought to be denied, and the objection be taken by the party and appear upon the record, the appellate court can administer the proper relief. | If, however, evidence in the nature of farther proof be introduced, and p. 241
no formal order or objection appear on the record, it must be presumed to have been done by consent of parties, and the irregularity is completely waived. In the present case, no exception was taken to the proceedings or evidence in the district court; and we should not, therefore, incline to reject the farther proof, even if we were of opinion that it ought not, in strictness, to have been admitted.

The objection, which is urged against the admission of the farther proof would, under other circumstances, deserve great consideration. Concealment, or even spoliation of papers, is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labour under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of farther proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply.

In the present case there can be no doubt that there has been a gross
p. 242 prevarication and suppression | of testimony by the master and supercargo. Nothing can be more loose and unsatisfactory than their first examinations; and the new and circumstantial details given upon their second examinations are inconsistent with the notion of perfect good faith in the first instance. The excuse, too, for throwing the packet of papers overboard is certainly not easily to be credited; for the ship's documents which still remained on board would, in the view of a Carthagenian privateer, have completely established a Spanish character. It is not, indeed, very easy to assign an adequate motive for the destruction of the papers. If the ship was Spanish, it was, as to American cruisers, immaterial to whom the cargo belonged; for, by our treaty with Spain, (treaty of 1795, art. 15,) declaring that free ships shall make free goods, the property of an enemy on board of such a ship is just as much protected from capture as if it were neutral. The utmost, therefore, that this extraordinary conduct can justify on the part of the court is to institute a more rigid scrutiny into the character of the ship itself. If her national Spanish character be satisfactorily made out in evidence, the spoliation of the documentary proofs of the cargo will present no insuperable bar to a restitution. Very different would be the conclusion, if the case stood upon the ground of the law of nations, unaffected by the stipulations of a treaty.[1] |

[1] By the ancient French law, spoliation of papers was a substantive ground of condemnation. Thus, by the ordinances of 1543, art. 43, and of 1584, art. 70, the throwing overboard of the charter party, or other papers respecting the lading of the vessel, is declared cause of condemnation. And by the ordinance of August, 1681, *Des Prises*, art. 6, all vessels, on board of which no charter party, bills of lading, or invoices are to be found, are, together with their cargoes, declared good prize. Doubts having arisen as to the application of this rule of evidence, in cases where sufficient papers were found remaining on board, to furnish proof of the proprietary interest, the ordinance of the 5th Sept., 1708, was rendered; by which it was provided, that every captured vessel, from which papers have been thrown overboard, shall be good prize, together with the cargo, upon proof of this fact alone, without its being necessary to examine into the nature of the papers destroyed, nor to inquire whether sufficient papers were found remaining on board to furnish evidence that the ship and the goods of her lading belonged to allies or friends. But this decision appearing too vigorous in practice, Louis XIV, in a rescript of the 2d February, 1710, addressed to the Admiral of France, directed the council of prizes to apply the terms of this ordinance according to the peculiar circumstances, and the subsidiary proofs in each case. Valin is of the opinion that, though this rescript escaped the attention of the framers of the regulation of the 21st October, 1744, (the 6th article of which is entirely conformable to the ordinance of the 5th September, 1708,) yet it ought to be applied to temper the rigour of this article, according to circumstances. *Valin, sur l'Ordonnance, Ib.* And, according to the authority of a celebrated modern jurist of France, such regulations should always be tempered by wisdom and equity; they are improperly styled *laws;* and essentially variable *pro temporibus et causis.* He cites in confirmation of his opinion, that even the want or suppression of papers is not conclusive, a sentence of the council of prizes of the 27th December, 1779, restoring the captured vessel, notwithstanding some papers had been thrown overboard, it being proved that the papers were not of such a nature as to show the property enemy's, and the master not being accessary to the spoliation. See the opinions of *M. Portalis*, in the cases of the *Pigou* and the *Statira*. 2 *Cranch*, 99. note, (a.) *Ib.* 104. note, (a.) The Spanish

Upon a full examination of the evidence we are of opinion that the p. 243
Spanish character of the ship is entirely sustained, and, therefore, the claimants are entitled to a decree of restitution. Two objections have been urged against this conclusion: 1. That the ship is not documented according to the requisitions of the treaty with Spain, and, therefore, not within the protection of that treaty. 2. That it does not | appear that p. 244
Mr. Hibberson (who is a native of Great Britain) has ever been naturalized in the dominions of Spain, and therefore he is not a *subject* of Spain, within the meaning of the treaty.

As to the first objection, it is certainly true that the ship was not furnished with such a sea letter, or passport, or such certificates as are described in the 17th article of the treaty. But the want of such documents is no substantive ground for condemnation. It only justifies the capture, and authorizes the captors to send the ship into a proper port for adjudication. The treaty expressly declares, that when ships shall be found without such requisites, they may be sent into port, and adjudged by the competent tribunal; and 'that all the circumstances of this omission having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property by testimony entirely equivalent.' It is apparent, from this | language, that the omission p. 245
to comply with the requisites of the treaty was not intended to be fatal to the property. And, certainly, by the general law of nations, as well as by the particular stipulations of the treaty, the parties would be at liberty to give farther explanations of their conduct, and to make other proofs of their property. If, indeed, upon the original evidence, the cause should appear extremely doubtful or suspicious, and farther proof should be necessary, the grant or denial of it would rest upon the same general principles which govern the discretion of prize courts in other cases. But in the present case, there is no necessity for such farther proof, since the documents and testimony now before us, are, in our opinion, as to the proprietary interest in the ship, entirely equivalent to the passports and sea-letter required by the treaty.

As to the second objection, it assumes, as its basis, that the term 'subjects,' as used in the treaty, applies only to persons who, by birth or naturalization, owe a permanent allegiance to the Spanish government. It is, in our opinion, very clear that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and co-extensive privileges to both countries; and to

law as to spoliation, is conformable with that of France, and its application to the above case would probably have been urged by the counsel for the captors, upon the principle of reciprocity, had they not been precluded from resorting to that argument by a former decision of the court, in the case of the Nereide, 9 *Cranch*, 388.; a majority of the judges being of opinion that the principle of reciprocity or amicable retaliation, formed no rule of judicial decision in the courts of this country, until it was prescribed as such by the legislative will. *Id.* 422.

effectuate this object, the term ' subjects,' when applied to persons owing allegiance to Spain, must be construed in the same sense as the term ' citizens,' or ' inhabitants,' when applied to persons owing allegiance to the United States. What demonstrates the entire propriety of this
p. 246 construction is, that in the 18th article of the | treaty, the terms ' subjects,' ' people,' and ' inhabitants,' are indiscriminately used as synonymous, to designate the same persons in both countries, and in cases obviously within the scope of the preceding articles. Indeed, in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, while he resides in it ; temporary, indeed, if he has not, by birth or naturalization, contracted a permanent allegiance ; but so fixed that, as to all other nations, he follows the character of that country, in war as well as in peace. The mischiefs of a different construction would be very great ; for it might then be contended that ships owned by Spanish subjects could be protected by the treaty, although they were domiciled in a foreign country, with which we were at war ; and yet the law of nations would, in such a predicament, pronounce them enemies. We should, therefore, have no hesitation in over-ruling this objection, even if it were proved that Mr. Hibberson was not a naturalized subject of Spain ; but we think the presumption very strong that he had become, in the strictest sense of the words, a Spanish subject.

The Spanish character of the ship being ascertained, it is unnecessary to inquire into the proprietary interest of the cargo, unless so far as to ascertain that it does not belong to citizens of the United States ; for the treaty would certainly not protect the property of American citizens
p. 247 trading with the enemy in | Spanish ships. There is no presumption, from the evidence, that any American interest is concerned in the shipment. The whole property belonged either to British subjects or to the claimants, and we think the proofs in the cause very strongly establish it to belong as claimed.

The decree of the circuit court is affirmed with costs.

Decree affirmed.[1]

[1] It is obvious that the privilege of the neutral flag of protecting enemy's property, whether conferred by treaty or by the ordinances of belligerant powers, cannot extend to a fraudulent use of the flag to cover enemy's property in the ship as well as the cargo. The Minerva, 1 *Marriott's Adm. Dec.* 235. The Citade de Lisboa, 6 *Rob.* 358. The Eendraught, *Ib.* Note, (*a.*) During the war of the American revolution the United States, recognising the principles of the armed neutrality, exempted by an ordinance of congress all neutral vessels from capture, except such as were employed in carrying contraband goods, or soldiers, to the enemy ; it was held that this exemption did not extend to a vessel which had been guilty of grossly unneutral conduct, in taking a decided part with the enemy, by combining with his subjects to wrest out of the hands of the United States and of France the advantages they had acquired over Great Britain, by the rights of war in the conquest

The George.

(2 Wheaton, 278) 1817.

A question of collusive capture. The capture pronounced to be collusive, and the property condemned to the United States.

THIS is the same cause which is reported in the first volume of these Reports, p. 408, and which was ordered to farther proof upon the points there stated.

March 6th.

The cause was argued by Mr. *Webster* and Mr. *G. Sullivan*, for the captors, and by the *Attorney-General*, for the United States. p. 279

March 15th.

Mr. Justice JOHNSON delivered the opinion of the court.

This is one of those cases which too often occur in courts exercising admiralty jurisdiction, in which the court is left to decide between the most positive testimony on the one hand, and the most obstinate circumstances on the other.

The privateer Fly had captured the schooner George, and carried her into the province of Maine. But various circumstances having excited a suspicion that the capture was collusive, a claim was filed in behalf of the United States, and she was adjudged to the government, in opposition to the right set up by the captor.

In all the courts through which this case has passed, the most ample

of Dominica. By the capitulation of that island, all commercial intercourse with Great Britain was interdicted. In the case in question, the vessel was purchased by neutrals in London, who supplied her with false and colourable papers, and assumed on themselves the ownership of the cargo, for a voyage from London to Dominica. The continental court of appeals, in pronouncing the vessel and cargo liable to condemnation, observed, 'Had she been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be prize; because congress had said, by their ordinance, that the rights of neutrality should extend protection to such effects and goods of an enemy. But, if the neutrality were violated, congress have not said, that such a *violated neutrality* shall give such *protection*: Nor could they have said so, without confounding all the distinctions between right and wrong.' The Erstern, 2 *Dall.* 36. The only treaties now subsisting between the United States and foreign powers, containing the stipulation that free ships shall make free goods, are the above treaty with Spain, that of 1782 with the Netherlands, (which, it is presumed, still subsists, notwithstanding the changes in the political situation of that country,) and the treaties with the Barbary states. The conventions between the latter and Christian powers always contain the stipulation, that the flag and pass shall protect the cargo sailing under it. In the memorable case of the Nereide, 9 *Cranch*, 388., it was contended by the counsel for the captors, that this stipulation in the Spanish treaty, taken in connexion with the law of Spain, necessarily implied the converse proposition, that *enemy's ships make enemy's goods*, which is not expressed in the treaty. But this argument was overruled by the court, who held that the treaty did not contain, either expressly or by implication, a stipulation that enemy's ships shall make enemy's goods. *Id.* 418. See *Ward on the Relative Rights and Duties of Belligerant and Neutral Powers*, 145. p. 248

opportunities have been given for the production of testimony. But, unfortunately, this indulgence has only served to thicken the difficulties of the case.

We have now before us the most positive depositions of the supercargo and the shippers of the George, (men whose veracity stands unimpeached,) denying, in every point, the collusion, and contradicting, in almost every material point, the evidence upon which the adjudications took place in the courts below. On the other hand, the characters of Thomas and Rodick, who swear to positive confessions on the subject
p. 280 of the fraud, are amply supported | by the most respectable testimony, whilst the veracity of Wasgate and Stanwood, who testify to the same point, stands wholly unimpeached.

It is painful to a court ever to express an opinion that results in an imputation of wilful perjury, and, as much as it is possible in this case, we will put out of view the clashing testimony of individuals, and consider the case upon those facts concerning the truth of which the evidence leaves no doubt.

It is a notorious fact, and is expressly and repeatedly sworn to in this case, that during the restrictive system and the late war, English manufactures, in immense quantities, were accumulated in the small ports on the west coast of Nova Scotia, and it is a melancholy truth, which this court has had but too much cause to know, that many unprincipled individuals were actively engaged in introducing those goods into the United States, under innumerable artifices, and to an immense amount. The protection of the British government was openly given to this intercourse, and there were found but too many in our country who countenanced and encouraged it. Hence this illicit intercourse was actively carried on, and naturally casts a suspicion on such shipments made in that quarter. On the other hand, although an effort has been made to show, that a trade in the same articles was carried on between those provinces and the Havanna, but one instance can be shown of such a shipment. All the witnesses agree, that the exports from St. Johns to the Havanna consisted of fish and lumber. Indeed, from the course of
p. 281 trade at that time, it is notorious that the Havanna | as well as other Spanish ports to the southward, were crowded with British manufactures, for the same unprincipled trade carried on at Amelia Island. The shipment, then, in the first instance, is a suspicious one, and leads to the opinion that the dry goods were intended for the United States, whilst the fish and lumber were to be used only as the cover under which they were to be introduced. But this reasoning may be consistent with the idea of a destination to any port of the United States, as well as the ports in that vicinity with which this privateer appears to have been connected. Let us, then, examine if the George was equipped for a voyage

of any duration. And here the evidence is irresistible to show that she was not. She had no dunnage, or platform, for the purpose of preserving the goods from damage by water, and nothing was stowed or packed in such a manner as to indicate preparation for a protracted voyage. Her sails and rigging were old, worn, and deficient in quantity, and her mainsail too large both for mast and boom. Her wood, and water, and provisions very scanty; and her crew, before the mast, not more than one half of what were necessary for a long and a winter's voyage. Add to this, that her captain is proved to have been a very young man, scarcely twenty-one years of age, altogether unknown to the shippers, and engaged only four days before the vessel's sailing. It cannot be believed that so valuable a cargo could have been destined for so long a voyage with such defective equipments; no court, upon such evidence, would | have p. 282
hesitated to avoid a policy on either vessel or cargo.

We, therefore, think, that her real destination must have been to some port in the vicinity of that at which her voyage commenced. How, then, was the cargo to be introduced?

Here I regret that it is necessary to notice a part of the testimony of Gregory Vanhorne, which certainly casts a shade upon all the rest of his testimony. The George, it appears, had actually sailed under convoy of the Beaver as far as Etang Harbour. There the vessel lay in a secure port, under the protection of the Martin sloop of war, and at a place occasionally assigned as a place of rendezvous to vessels that were to sail under convoy. Yet Vanhorne swears that he heard the commander of the Martin expressly order the captain of the George to depart for the place where she was captured, an open road, without protection, only fifteen miles from Etang Harbour, and there to wait the indefinite arrival of some unascertained convoying vessel. This cannot be true. For, independently of the fact, which appears to be satisfactorily established, that Long Island Harbour, in the island of Grand Magnan, when this vessel was captured, had never been used as a place of rendezvous for a convoy, it is very clear that such an order would not have been obeyed by a vessel that feared exposure to capture; for it is proved to have been a place often visited by American privateers.

We, therefore, consider the vessel's departure from Etang Harbour to the place where she was | captured as voluntary, and her patient p. 283
stay at that place as manifesting that she did not fear exposure to American capture. Yet it does not follow necessarily, that it was the Fly privateer that she was waiting for, nor that she expected to be captured at all. The cargo intended for the American market may, by possibility, have been intended to be introduced into the United States, by being transhipped into some smuggling vessel. So far every thing comports perfectly with the innocence of this capture.

But the privateer Fly also draws suspicion upon herself in the very inception of her voyage. We find, what we pronounce absolutely unprecedented, notwithstanding every effort to prove the contrary, that the captain, Dekoven, is sole owner of the privateer, and every man under him, from the lieutenant down, is engaged on wages. In the case of the Washington privateer it was a circumstance of great weight with this court that nine out of fifteen of the ship's company were joint owners, and it was thought improbable that such a transaction, if there was fraud in it, would have been confided to so many witnesses.[1] But here no man but the captain is to participate in the prize money, and he thus presents himself as the most convenient agent possible to be intrusted with such an undertaking. Perhaps this circumstance may give a leaning
p. 284 to the mind of the court in considering the effect which ought to be | given to other evidence in the cause; but if so, it is Dekoven's misfortune, and one which he has himself furnished the cause for.

It then becomes necessary to consider whether the arrival of Captain Dekoven was the object of this vessel in taking the position she did, in the island of Grand-Magnan. And here it is proper to remark that Etang Harbour, lying up the bay of Passamaquoddy, N. W. and by W. of St. Johns, where this vessel took in her cargo, is off the course to Cuba, and a very convenient situation for intelligence with Machias, in the province of Maine, by means of a chain of islands extending across the bay. One of these islands is Moose Island, about five leagues distant from Grand Magnan, and something less from Etang Harbour. Now, the evidence is very satisfactory to prove that the Fly lay, some time in December, at Machias; that during that time Sebor, the lieutenant and brother-in-law of Dekoven, was absent from the vessel. And Jabez Mowry, who resides on Moose Island, swears, that during the time Sebor was on Moose Island, and holding communication with certain notorious smugglers from the states; to one of which, of the name of Toler, from New-York, he had a letter. Again; the pilot who was on board the Fly swears that from all he saw on the occasion of the capture, he concluded it was *amicable*; and Aaron Gale, a witness, resident upon the island of Grand-Magnan, who saw the whole transaction, swears to the same fact, and adds, that after the capture, the captain of the privateer and his
p. 285 prize-master came on shore to a | neighbouring house, where the witness then was, and got something to drink. This looks very little like a consciousness of being among enemies. To this he adds, that he heard a British officer, who was at the time recruiting upon the island, threaten Vanhorne, the super-cargo, who, together with all the crew except the supposed captain, were immediately put on shore, to put him in irons for the fraud in thus colluding with the enemy.

[1] Vide 2 Wheaton, p. 169, The Bothnea and Jahnstaff.

I will notice but two more pieces of testimony which the case affords, and which, taken with the rest, we think too strong to be resisted. The first is that of Richard Higgins, who testifies that, on the arrival of the George off the harbour called Frenchman's Bay, or, as he expresses himself, at Mount Desert, he, the deponent, was the first person who boarded her; that Sebor, the lieutenant of the Fly, who was the prize-master, told him where they had captured the George; upon the witness's inquiring what she was loaded with, he replied, fish and lumber. The witness remarked that she floated very light for such a load, upon which Sebor replied he did not know what the cargo consisted of, and that he wanted to get farther to the westward. The witness then told him, distinctly, 'that he presumed the capture had been made by some previous understanding, and that, if such were the case, he thought he would be likely to fare better, and undergo a less rigorous scrutiny, if he put into this district, than he would if he went into any of the more western districts, upon which, after consulting with some one of his crew, he went in.' This testimony is important in | two views, 1st. p. 286
The plot here developes itself, and we find the fish and lumber actually resorted to as the means of cloaking the introduction of the British goods. And the resort of Sebor to this deception, (for he must have known it to be such, had it been only from the inspection of the invoice,) shows his privity to the secrets of the machinery. 2dly. Going into the port after the suggestion of Higginson, amounts to a passive acquiescence in the correctness of his suggestions, and an acceptance of the facilities held out to him to induce him to enter that port.

The last and only remaining piece of testimony that we shall notice, is that of Joseph Grindel, of Penobscot, who swears that he was in St. Johns at the time the George was lading; that he was familiarly acquainted with Vanhorne, the supercargo, and that he held a conversation with him, respecting a passage, and the shipment of a hogshead of molasses to the states, and remitting the money to his mother at Penobscot, which, if it be true, (and we have no cause to doubt his veracity,) puts to rest every question relative to the fraudulent design with which this adventure was undertaken. And the same witness further swears, that, after consenting to take his adventure on board, (an adventure that never could have been intended for the Havanna market,) Vanhorne sailed a day or two sooner than he had intimated to the witness. That upon this he complained to Nehemiah Merrit, the shipper, and received from him this notable answer, 'He suspected your politics, and was afraid you would betray him.' |

Upon the whole, we are of opinion that it was a case of collusive p. 287
capture, and that the decree below should be affirmed.

Decree affirmed.

The Anna Maria.

(2 Wheaton, 327) 1817.

A suit by the owners of captured property, lost through the fault and negligence of the captors, for compensation in damages.

The right of visitation and search is a belligerant right which cannot be drawn into question; but must be conducted with as much regard to the safety of the vessel detained, as is consistent with a thorough examination of her character and voyage. |

p. 328 Detention, after search, pronounced to be unjustifiable, under the circumstances of the case.

The value of the captured vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, where it has been paid, allowed in ascertaining the damages.

APPEAL from the circuit court for the district of Maryland.

March 11th.

This cause was argued by Mr. *Harper* and Mr. *Swann*, for the appellants; and by Mr. *Winder* and Mr. *Jones*, for the respondents.

The schooner Anna Maria, belonging to citizens of the United States, sailed from Alexandria, on the 27th of September, 1812, laden with a cargo also belonging to American citizens, and bound to St. Bartholomews, a neutral island. On the 16th of October, the schooner made the Virgin islands, where she continued, it being calm, until the 19th. About mid-day, on the 19th, light breezes sprung up from the eastward, and the Anna Maria, as stated by her master, was using her utmost endeavours to make St. Bartholomews. It appears, however, that the vessel headed towards St. Thomas's, an island in possession of the British. In this situation a sail, which proved to be the Nonsuch privateer, of Baltimore, was discovered bearing east northeast from them, which gave chase under English colours, and soon overtook them. The Anna Maria was boarded about four in the afternoon, and her master, with all her papers, sent on board the Nonsuch. A search for other papers was commenced
p. 329 and continued for | about two hours. The boarding officer, who had appeared in the disguise of a British officer, then returned to the Nonsuch, being succeeded by another officer, who kept possession of the Anna Maria with two men, and was ordered to continue under the lee of the Nonsuch till the succeeding day, when it was intended, as alleged, to continue the search. The whole crew of the Anna Maria were taken out, and, with her master, put in irons. The next morning, about nine, two other vessels were descried, and, as stated by the master of the Anna Maria, and by one of the officers of the privateer, were chased by the Nonsuch. In the chase she lost sight of the Anna Maria, and soon afterwards fell in with her. The officer, with the two men on board her, attempted, as they

say, to bring her into the United States; but, being in want of water, wood, and candles, they went into St. Jago del Cuba, and sold a part of the cargo to enable them to purchase these necessaries. In attempting to bring the vessel out of port, she was run aground and injured; after which she was sold with the residue of her cargo, and the proceeds remained in the hands of the American consul for those who may be entitled to them.

The Nonsuch soon afterwards returned to the United States, and a libel was filed by the owners of the Anna Maria and cargo, against the owners of the Nonsuch, in the district court of Maryland, claiming compensation in damages for the injury they had sustained. This libel was dismissed by the district | court, and the decree affirmed by the circuit p. 330
court; on which the cause was brought, by appeal, to this court.

Mr. *Swann* and Mr. *Harper*, for the appellants, admitted, that the owners of the captured property could not come into a court of prize, unless with clean hands, to claim restitution in damages. If the original seizure was justifiable, and there was no subsequent misconduct on the part of the captors, they could not be compelled to make restitution. But it is the duty of captors to send in the captured vessel immediately for adjudication before the proper tribunal, and to the most convenient port. This they had not done; and were, therefore, responsible to the owners in damages. Even if the commander of the privateer acted *bona fide*, he acted with gross negligence and unskilfulness, and the authority of the case of the Der Mohr[1] is enough to charge him with restitution in value.

Mr. *Winder* and Mr. *Jones*, for the respondents, argued, upon the facts of the case, that the real destination of the captured vessel was to supply the enemy, and that there was probable cause of seizure. If so, damages could not be recovered. There was sufficient ground for carrying in for adjudication, or ground of condemnation as prize; either would be sufficient to justify the captors in the seizure; the only question is, whether the right of seizure was | properly exercised. The prize law does p. 331
not prescribe any particular mode of exercising the right of visitation and search, nor when, nor into what particular port the prize is to be sent for adjudication. It is the exercise of a military discretion; and the case of the Der Mohr shows that the captors are not responsible for an *accidental* loss after the capture, if there is probable cause of seizure and carrying in for adjudication.

March 13th.

|Mr. Chief Justice MARSHALL delivered the opinion of the court, and after stating the facts proceeded as follows:

[1] 3 *Rob.* 129. 4 *Rob.* 314.

To sustain the claim of the libellants, the first point to be established is, the fairness of the voyage. It being admitted that the vessel and cargo were American, the only inquiry is, was the Anna Maria really destined for a neutral port?

Her papers show that she was destined for St. Bartholomews; her master swears that he intended to reach that port, and no other; and that he was using his best endeavours to make it when he was stopped by the Nonsuch.

The circumstances which might create doubt respecting the truth of this testimony, are, his situation and course when descried by the Nonsuch. He was within six or eight leagues of St. Thomas's, and steering a course which brought him nearer to that island. But his place is accounted for by the current and the calm which had preceded his capture; and his
p. 332 course is stated by himself, and his testimony | is not contradicted, to have been calculated to enable him to gain St. Bartholomew's, to the leeward of which he had fallen. This representation is supported by the fact, that being at the Virgin Islands on the 16th, he might, by availing himself of the current, have reached St. Thomas's before he was descried by the Nonsuch. It is also supported by the great improbability of his attempting to enter an enemy's port without obtaining a license, which would have protected him from hostile capture in that port, as well as on his voyage to it. That he had not a license is proved, not only by his own oath, but by the fact that, although the master and crew, as well as the vessel, have remained in possession of the captors, no license has been found, and there is no reason to believe that it could have been secreted, and it is not probable that it would have been destroyed on the appearance of the Nonsuch, since she chased and boarded under British colours.

The voyage, then, must be considered as entirely fair. The next subject of inquiry is, the right to visit and to detain for search. This is a belligerant right, which cannot be drawn into question. As little can it be questioned that the situation of the Anna Maria justified a full and rigorous search. But this search ought to have been conducted with as much regard to the rights and safety of the vessel detained as was consistent with a thorough examination of her character and voyage. All that was necessary to this object was lawful; all that transcended it was unlawful. |
p. 333 When the Anna Maria was boarded, her master gave a plain and true account of the character of the vessel and cargo, which was verified by the ship's papers, and which does not appear to have been doubted. But although the vessel and cargo were American, the trade might be hostile; and the right to examine fully into this fact was complete.

There was no prevarication in the statements of the master which could excite suspicion, and the search for other papers was continued for two hours without intermission. Although the character of British

officers was maintained, nothing indicating British connection in the voyage was discovered; and, although the trunks were broken open and searched, no additional papers were found. It was pressing the right of search as far as it could bear, to determine on repeating it the next day; and on inattention to the safety of the Anna Maria, which only her neighbourhood to the island of St. Thomas could excuse, longer to detain her. But there is some reason to doubt whether further search was the real object of this detention. It does not appear to have been recommenced at nine the next morning; and this leads to the opinion that the vessel was detained, not so much to make farther search as in the hope of drawing from the master, or some of the crew, who were all in irons, something which might lead to the condemnation of the vessel and cargo. This conduct must be viewed with much lenity to be pardoned. But whatever excuse may be made for the detention thus far, none can be given for the transactions which remain to be noticed. |

Before the captain of the Nonsuch left the Anna Maria, in pursuit of p. 334
other objects, he ought to have decided either to seize her as prize or to restore her. Had he seized her as prize, her master, at least, ought to have been returned to her, and her papers should have been sealed and put in possession of a prize master. If he determined not to seize her as prize, her master and crew ought to have been restored, that she might have prosecuted her voyage. No apology can be made for leaving her in the condition in which she was placed. Stripped of her crew and of her papers, left in possession of an officer and two men, without orders whither to proceed, she was exposed to dangers; for the loss resulting from which, those who placed her in this situation must be responsible. Had she been regularly captured, many of the difficulties encountered in St. Jago del Cuba might have been avoided; had she been restored, she might, and probably would, have reached her port of destination in safety.

The proceedings of the Nonsuch, after a search, converted the whole transaction into a wanton marine trespass, for which no sufficient excuse has been given.

However meritorious may have been the services of the private armed vessels of the United States, in the aggregate, those individuals who have acted with this culpable disregard to the rights of others ought not to escape the animadversion of the law. The conduct of the officers of the Nonsuch on board the Anna Maria was unjustifiably licentious. Breaking | p. 335
open trunks when keys were offered them, taking out the crew and putting them in irons, and leaving her in this situation, were acts not to be excused. The honor and the character of the nation are concerned in repressing such irregularities; and the justice of the court requires that compensation should be made for the injury which the libellants have sustained.

The sentence of the circuit court must be reversed, and the cause remanded to the circuit, with directions to reverse the sentence of the district court, and to direct commissioners to ascertain the amount of damages sustained by the libellants; in doing which, the value of the vessel, and the prime cost of the cargo, with all charges, and the premium of insurance, where it has been paid, with interest, are to be allowed. Out of this decree must be deducted the amount of the proceeds of the Anna Maria and cargo, unless the libellants shall choose to abandon those proceeds to the defendants.

Sentence reversed.

The Eleanor.—Donnell, claimant.

(2 Wheaton, 345) 1817.

A libel against the commander of a squadron calling on him to proceed to adjudication, or to make restitution in value, of a vessel and cargo, detained for search by the captain of a frigate belonging to the squadron, and lost while in his possession. Libel dismissed.

The commander of a squadron is liable to individuals for the trespasses of those under his command, in case of positive or permissive orders, or of actual presence and co-operation. But *quære*, how far is he responsible in other cases?

Where *a capture has actually taken place*, with the assent, express or implied, of the commander of a squadron, the prize master may be considered as a bailee to the use of the whole squadron, who are to share in the prize money, and thus the commander may be made responsible; but not so as to mere trespasses, unattended with a conversion to the use of the squadron.

The commander of a single ship is responsible for the acts of those under his command; as are, likewise, the owners of privateers for the conduct of the commanders appointed by them.

To detain for examination, is a right which a belligerant may exercise over every vessel, except a national vessel, which he meets with on the ocean.

The principal right necessarily carries with it all the means essential to its exercise; among these may, sometimes, be included the assumption of the disguise of a friend or an enemy, which is a lawful stratagem of war. If, in consequence of the use of this stratagem, the crew of the vessel detained abandon
p. 346 their duty before they are | actually made prisoners of war, and the vessel is thereby lost, the captors are not responsible.

Whenever an officer *seizes a vessel as prize*, he is bound to commit her to the care of a competent prize-master and crew; not because the original crew, when left on board, (*in the case of a seizure of the vessel of a citizen, or neutral,*) are released from their duty without the assent of the master, but from the want of a right to subject the captured crew to the authority of the captor's officer. But this rule does not extend to the case of a mere *detention for examination*, which the commander of the cruising vessel may enforce by orders from his own quarter deck, and may, therefore, send an officer on board the vessel detained, in order more conveniently to enforce it, without taking the vessel out of the possession of her own officers and crew.

The modern usages of war authorize the bringing one of the principal officers of the vessel detained on board the belligerant vessel, with the papers, for examination.

APPEAL from the circuit court for the district of Massachusetts.

This schooner, with her cargo, the property of the claimant, on a voyage from Baltimore to Bordeaux, fell in with the President and Congress frigates on the night of the 16th October, 1813.

Commodore Rodgers was the commander of the President frigate, and the commodore and commander of the squadron composed of those two ships, then in company. Captain Smith, deceased, and charged in the libel as a co-defendant, commanded the Congress.

On the Eleanor being discovered by the two frigates, she was chased by the Congress and overhauled. The President stood on her course, being out of sight at the time she was overhauled and when she was subsequently dismasted, and so continuing until the signal guns were fired from the schooner. The | master, supercargo, and the officers and crew of the Eleanor, p. 347
on seeing the frigates, considered them British cruisers, and when they found she could not escape them, concluded they were captured by the enemy. This produced a very general determination, on the part of the crew, to take no further concern in the navigation of the schooner. When boarded by lieutenant Nicholson of the Congress, the schooner was in the state of confusion to be expected from such a determination. He ordered the master to take one of his mates, and his papers, and go on board the frigate. The captain, after giving some orders to his second mate to adjust the sails of the schooner, which were not complied with, went with his first mate and papers, in the frigate's boat, to the Congress. Lieutenant Nicholson, on being asked by a boy what frigate it was, said it was the Shannon ; immediately afterwards he *undeceived the supercargo*, whom he recognized as an old acquaintance, but said he was ordered not to make himself known, and, therefore, requested the supercargo not to disclose it. Upon endeavouring to restore order, and to provide for the safe navigation of the schooner, he could get no assistance from the crew, (who refused to obey his orders, considering him a British officer,) except from the second mate, and on observing this, he disclosed the name of the frigate, and he, the supercargo, and the mate, assuring the crew they were not prisoners, endeavoured to prevail on them to return to their duty ; they persisted in refusing ; in consequence of which (the sea being tempestuous, and the weather squally) a flaw struck | the vessel and both p. 348
her masts went over. Lieutenant Nicholson, the mate, and supercargo, endeavoured to save the vessel, but the crew would not obey either of them. She was afterwards assisted, as far as possible, by the frigates, but finally abandoned and lost.

The libel was filed against commodore Rodgers, and captain Smith, alleging that the loss of said vessel and cargo was owing ' to the deception unlawfully practised on her crew by the officers of the said squadron, and through the want of care, inattention, and gross negligence, of the officer

of said frigate Congress, in the navigating said schooner, of which he had taken, and then had command,' and praying for a monition against them to proceed to adjudication, or to show cause why restitution in value should not be decreed.

The district court considered this allegation supported by the proof, and that commodore Rodgers was answerable, as commander of the squadron, and decreed against him for forty-three thousand two hundred and fifty dollars, the value of said vessel and cargo. The circuit court affirmed the decree *pro forma*, and thereupon the cause was brought by appeal to this court. After the filing of the libel, and before the decree in the district court, the death of Captain Smith, which had intervened, was suggested on the record.

March 12th.

Mr. *Key*, for the appellant, made three points :

1st. That it was owing to the neglect and misconduct of the captured crew the vessel was lost. |

p. 349 2d. That this neglect and misconduct were in no degree owing to, or palliated by, the military stratagem practised by Captain Smith.

3d. That, at all events, Commodore Rodgers was not responsible in law.

The neglect of the captured crew, in refusing to do duty, is analogous to the case of Virtue v. Bird,[1] where the plaintiff declared that he was employed by the defendant to carry a load of timber from W. to I., to be laid down where the defendant should appoint, and that he carried it ; when the defendant, having appointed no place where it should be laid down, the plaintiff's horses were detained in the cold, by which some of them died, and the rest were spoiled : after a verdict for the plaintiff, judgment was arrested ; for it was the plaintiff's own fault that he did not take out his horses, and lead them about ; or he might have unloaded the timber in any proper place, and returned. So, also, in Butterfield v. Forrester,[2] which was an action on the case for obstructing a highway, by means of which the plaintiff, who was riding along the road, was thrown down with his horse, and injured ; it appeared that he was riding with great violence and want of ordinary care, without which he might easily have avoided the obstruction. It was, therefore, decided, that he could not recover ; for that two things must concur to support the action : an obstruction in the road by the fault of the defendant, and no want of

p. 350 ordinary care, to avoid it, on the part of the plaintiff. Upon the | principle of these cases, the appellant is exempted from all liability. Nor is he responsible upon the ground of the liability of a master and principal for the misconduct of a servant and agent. Superiors in these relations of

[1] 2 *Lev.* 196. [2] 11 *East*, 60.

life are answerable only for acts in the ordinary line of the duty of the servant and agent, or in consequence of the special orders of the superior. But this principle, with its limitations, does not apply to the case of a commander of a squadron. He does not elect his officers. They are appointed by the government, and amenable only to a court martial. No officer, military or naval, would undertake so frightful a responsibility; and to impose it upon the command of a fleet or squadron would be to incapacitate him from the performance of his duty. There is no testimony, positive or presumptive, that Commodore Rodgers gave any orders whatever to practice the stratagem in question. The authority of the Mentor [1] shows, that he is not liable, constructively, for the conduct of the officers under his command; nor is there any one case to show that he is thus liable. The Der Mohr [2] is, *apparently* only, such a case. It only proves that a superior officer *may* be placed in the same relation with that of a principal, in regard to his agent. In that case, the captors had a right of property in the captured vessel, inasmuch as by the law of England captors have the entire interest in prizes; and any person may be appointed prize-master, and so become the agent of the whole squadron, the commander | of which would, consequently, be responsible. Public p. 351
policy does not require the establishment of the principle contended for on the other side, since the injured party may have recourse to the actual wrong doer, and may seek redress by complaining to the government of his misconduct.

Mr. *D. B. Ogden*, contra. The case cited from *Levinz* is not parallel; and that from *East* is one of gross folly and want of common prudence and caution on the part of the plaintiff. It is inapplicable, because it was not in the power of the libellant in this case to save his property from destruction. But the present question is not to be determined by the narrow principles of the common law; it is a marine trespass, which must be tried by the more liberal rules of the marine law. The right of visitation and search is not, and cannot be denied; but it is not essentially necessary to the due exercise of the right that the master should be taken out of his vessel: it is only necessary to send a boarding officer to make the proper examination and inquiries; but the belligerant cruisers have no right to proceed further, until they have determined to send in the vessel for adjudication. When this determination is made, a competent prize-master and crew should be put on board, instead of leaving the original crew without control or regulation. A belligerant has a right to practice deception, as a stratagem of war; but this *right*, which may cause a *wrong* to a neutral or fellow citizen, must be exercised at the peril of the captors. Either the seizure of the Eleanor | was as *prize*, or she was p. 352
detained for *search*. If the former, then the captors had no right to

[1] 1 *Rob.* 179. [2] 3 *Rob.* 129. 4 *Rob.* 314.

require the assistance of the crew of the captured vessel,[1] who were not bound to assist in navigating her. If the latter, then the captors had no right to take out the master and mate, leaving the crew without any regular chief competent to navigate the vessel. The case of the Der Mohr was, indeed, determined on general principles of law ; on the ground that the prize-master was constituted agent of the captors, and the *vessel* (which was innocent) was used as a vehicle to bring in the *cargo*, which last alone was liable to suspicion. But here the trespass is joint ; and the trespassers would have been joint sharers of the prize : *Qui sentit commodum sentire debet et onus.* The President was out of sight at the time of the seizure ; but she was present at the inception of the tort. They were cruising in conjunction, and under the orders of Commodore Rodgers, who saw the Congress frigate pursue the Eleanor, and did not prohibit the chase. The boarding officer was a mere passive instrument in the hands of his superiors, to whom alone the injured party can look for indemnification.

Mr. *Harper*, (on the same side.) The responsibility of the owners of privateers and the commanding officers of ships and squadrons, for the misconduct of their delegates, is a settled principle of law. The case of
p. 353 Del Col v. Arnold[2] is in point, where | this court decreed the owners of a privateer to make restitution in value of a captured vessel lost by the misconduct of the prize-master. The case of the Der Mohr, which has been so often referred to, makes the senior officer responsible for the appointment of a prize-master by his junior officer, though there was no personal misconduct imputable to either. In the case now before the court, the *proximate* cause of the loss was the refusal of the seamen to work. The *ultimate* cause was the deception practised by the captors in representing themselves as enemies ; and whether the crew were justifiable in refusing obedience, or not, their disobedience was a consequence of the stratagem practised by the captors, and they are responsible. On the first supposition, they are liable ; because they ought to have put a prize crew on board. On the second, because the stratagem was practised at their peril, and it depended upon the event of the search whether they would be justified ; for this mode of warfare is not to be practised at the expense of individuals pursuing an innocent and lawful commerce. The case of the Mentor[3] is not, as has been contended, contrary to our position. The claimant there had taken out a monition against the *actual* captor, which had been dismissed ; it was, therefore, *res judicata ;* and, besides, the lapse of time which had intervened, was held to be an equitable limitation. It is true, that Sir William Scott likewise lays hold of the circumstance that
p. 354 admiral Digby was merely commander of the | North American station, and far off at the time when the capture was made : but here commodore

[1] *Wheaton on Capt.* 100. [2] 3 *Dall.* 333. [3] 1 *Rob.* 179.

Rodgers was present, and associated in the act. The case of the Charming Betsey [1] shows that innocence of intention alone in a commanding officer will not exempt him from the consequences of an illegal act. In substance and effect, this is a case between the government and the owner of the property which has been destroyed, who has become the victim of a rigorous prosecution of the rights of war and of military policy. *Respondeat superior!* We pursue him; let him, in turn, look for indemnification to his government, to which experience shows that he will not look in vain.

Mr. *Jones*, for the captors, in reply, argued on the facts that the loss of the vessel was not a consequence, direct or indirect, of the conduct of the seizing officer; and that the right of visitation and search had been properly exercised. It is novel doctrine, that the *right* of search is to be exercised under the peril of being responsible for a *wrong*. Reason, morality, and law, all concur in imposing the loss (among innocent parties) upon him on whom the elements and the act of providence throws it. It was entirely a question of military prudence whether the papers should be examined by the boarding officer or by his superior; and there is nothing in the principles of public law to prevent the exercise of the right of visitation and search either way. Neither are the crew of the vessel which is detained | for search, exempted from obedience in consequence of p. 355
the act of boarding. Until the capture is consummated, the former relations of the crew continue; and until then the cruiser is not bound to send on board a competent prize-master and sufficient crew to navigate the captured vessel. The commander of a squadron cannot, on any principle of law or justice, be made responsible, constructively, for the acts of officers on board other ships. The principles and analogies which would make commodore Rodgers a joint trespasser must be those of municipal law. But his was not a civil connection with the officers of the other ship; all that he knew, or permitted, was the chase; and he cannot be made responsible for the subsequent supposed misconduct of his brother officer. Here was a merely military act; no *animus lucrandi;* no appropriation as prize; and, therefore, no civil constructive responsibility. In the case of the Mentor, Sir William Scott expressly overrules the doctrine of the constructive responsibility of a commander in chief; apart from the other grounds of exception, the former adjudication, and the lapse of time which he likewise notices. The Der Mohr was a case of joint capture, as expressly stated by the court and the reporter; and was determined on the just principle of joint participation in the wrong done, in the interest acquired by the capture, and in the appointment of the prize-master.

March 15th.

Mr. Justice JOHNSON delivered the opinion of the court.

[1] 2 *Cranch*, 64.

This case presents two questions. 1st. Are the appellees entitled to recover? |

p. 356 2. Does their right of recovery extend to the commander of the squadron?

In whatever view the case be considered, it is one of extreme hardship; both the claim and the defence are founded in the most rigid principles of the *strictum jus;* and it is impossible not to regret if the libellant have no means of indemnity, or if that indemnity should be exacted of men whose characters and conduct were so far above all imputation of malice or oppression. Nor can this court altogether close its feelings against the claims to protection of that navy which has so nobly protected the reputation of the country. Yet we mistake the character of the men who constitute it, if they would not be among the first to declare the government unworthy of their skill and valour, in which the rights of the meanest individual was not as much an object of earnest solicitude as the rights of those whom their country delights most to honour. Whether the commander of a squadron be liable to individuals for the trespasses of those under his command is a question on which it would be equally incorrect to lay down a general proposition either negatively or affirmatively. In case of positive or permissive orders, or in case of actual presence and co-operation, there could not be a doubt of his liability. But on the other hand, when we consider the partial independence of each commander of a vessel, and that the association is not a subject of contract, but founded on the orders of their government, which leave them no election, it would be dangerous indeed, and dampening to the ardour of

p. 357 enterprise, to trammel a commander | with fears of liability, where it is not possible, from the nature of the service, and the delicate rules of etiquette, for him always to direct or control the actions of those under his command. We feel no inclination to extend the principle of constructive trespass, and will leave each case to be decided on its own merits as it shall arise. Where a capture has actually taken place with the assent of the commodore, express or implied, the question of liability assumes a different aspect; and the prize-master may be considered as bailee to the use of the whole squadron who are to share in the prize money. To this case there is much reason for applying the principle, that *qui sentit commodum sentire debet et onus;* but not so as to mere trespasses unattended with a conversion to the use of the squadron.

The case of the commander of a single ship varies materially from that of the commander of a squadron, and the rigid rules of liability for the acts of those under our command may, with more propriety, be applied to him. The liability of the owners of a privateer for the acts of their commanders has never been disputed. And it is because they are left at large in the selection of a commander, and are not permitted to disavow

his actions as being unauthorized by them. So, in the case of a commander of a ship, the absolute subordination of every officer to his command attaches to him the imputation of the marine trespasses of his subalterns on the property of individuals, when acting within the scope of his commands. Orders even giving a discretion to a subordinate in such cases is no more | than adopting his actions as the actions of the com- p. 358
mander ; and placing him in a command which requires skill, integrity, or prudence, makes the commander the pledge to the individual for his competence to discharge the duties of the undertaking.

With these views of the subject we should have found no difficulty in deciding on the liability of Captain Smith, of the Congress, had he been a party to this libel, and the facts of the case had made out a marine trespass in himself, or in Lieutenant Nicholson, or a want of competence or due care in the latter to discharge the command assigned him. But we are of opinion that no one act is proven in the case which did not comport with the fair, honorable, and reasonable exercise of the rights of war. To detain for examination is a right which a belligerant may exercise over every vessel, not a national vessel, that he meets with on the ocean. And whatever may be the injury that casually results to an individual from the act of another while pursuing the reasonable exercise of an established right, it is his misfortune. The law pronounces it *damnum absque injuria*, and the individual from whose act it proceeds is liable neither at law nor in the forum of conscience. And the principal right necessarily carries with it also all the means essential to its exercise. Thus, in the present case, a vessel must be pursued in order to be detained for examination. But if in the pursuit she had been dismasted, and upset or stranded, or run on shore and lost, it would have been an unfortunate case, but the pursuing vessel would have stood acquitted. The counsel in argument | have not denied the general doctrine, but have endeavoured p. 359
to show that the commander of the Congress had unreasonably exercised the right of detention.

1st. By the deception, in passing himself off for an enemy, thereby reducing the crew to a state of insubordination.

2d. By taking out both the master and the mate, and thus removing the possibility of bringing the seamen back to their duty.

3d. By devesting the master of his command, without putting a competent crew on board to navigate her.

On the first of these grounds, it is only necessary to remark, that, to assume the guise of a friend or an enemy, is, in legitimate warfare, an act the most familiar and frequent in its occurrence. It is so ordinary a *ruse de guerre*, that it ought rather to be expected than the display of real colours. And, innumerable cases that have come before this court prove, that in the actual state of things during the late war it became

as necessary to practice the deception upon our citizens as upon a neutral or an enemy. We, therefore, see nothing reprehensible in this. But on what ground could the crew assume the right of judging for themselves on this subject, and of abandoning their duty before they were actually made prisoners? Suppose the frigate had been an enemy, it did not follow that their vessel must be made prize, and they were unquestionably unpardonable in abandoning their duty. Their doing so, was by no
p. 360 means a necessary consequence | of ordering their officers on board the frigate, nor ought the captain of the Congress to have anticipated such a state of things, as their vessel was reduced to, by their misconduct. They were bound to obey the second mate in the absence of their other officers; and if they had done so, this misfortune would not have happened. So far from actually devesting him of his command, it appears, that Nicholson's orders were addressed to him, and only addressed to the men to try his personal influence in bringing them to order.

To the second and third grounds, the attention of this court has been drawn with peculiar force. Either of them appeared to be an irregularity, which the reasonable exercise of the right of search did not strictly justify. But, upon a close examination of the testimony, we are of opinion, that neither of those grounds is supported by the evidence. It is true, that both the master and first mate were taken on board the frigate, and the master and supercargo say they were both ordered on board. But Nicholson, the boarding officer, who certainly knew best what orders he gave, swears that he ordered the master to go on board with 'one of his mates,' thus leaving it to his election to choose between them; he farther swears, that these were the orders he received from the captain. And there is a fact in the case, which makes it probable, that the master of the schooner himself called on the first mate to attend him, for at that time the second mate was stationed at the bow, in charge of sinking certain despatches, in case of capture. Had the master remonstrated |
p. 361 against taking his first mate along with him, he would have done his duty, and perhaps saved his vessel. On the third point, it is unquestionably true, that, whenever an officer seizes a vessel as prize, he is bound to commit her to the care of a competent officer and crew. Not that the original crew, when left on board, in case of seizure of the vessel, of a citizen or neutral, are released from their duty without the assent of the master; for they are bound to attend the vessel, as she may be discharged, and pursue her original destination. But the obligation to man the prize, results from the want of a right to subject the crew of the captured vessel to the authority of his own officer. If, then, this vessel had been seized as prize, and no one put on board but the prize-master, without any undertaking of the original ship's company to navigate her under his orders, it is very questionable whether the appellants would not have

been liable for any loss that followed, from the insubordination of the crew. For after capture, as before observed, the prize-master becomes the bailee of the squadron, who are to share in the partition of the proceeds.

But we are of opinion that this was a mere case of detention for search; that the vessel was never actually taken out of possession of her own officers; that the captain of the Congress had a right to detain the vessel by orders from his own quarter-deck, and that the officers of the schooner, at their peril, were bound to obey; that Lieutenant Nicholson was left on board for no other purpose than to enforce, in a more convenient mode, the observance, on their | part, of the duty which the rights of war p. 362
authorized the frigate to exact of her. And all the misfortunes which followed resulted to the appellees from the fault or folly of their own crew.

One argument, insisted on at the bar, it is proper for this court to notice before we conclude. It was contended, that the master of the Eleanor ought not to have been removed from his vessel; that the right of search only authorized the sending of an officer on board to examine her papers. But we think otherwise. The modern usages of war authorize the bringing of one of the principal officers on board the cruising vessel, with his papers, for examination. To devest her of both her principal officers, without putting on board her, for the time, a competent officer and crew, would certainly be irregular. But it is for the interest of the commercial world, that the investigation should be made by the commander himself, and not left to any subordinate officer. In that case it would be absurd to require of the commander of the commissioned vessel to quit his command, for the purpose of making the necessary examinations.

We are, upon the whole, of opinion, that the court below erred; that the decree must be annulled, and the libel dismissed.

The London Packet.—Merino, claimant.

(2 Wheaton, 371) 1817.

It is the practice of this court, in prize causes, to hear the cause, in the first instance, upon the evidence transmitted from the circuit | court, and to decide upon p. 372
that evidence whether it is proper to allow farther proof.

Affidavits to be used as farther proof in causes of admiralty and maritime jurisdiction in this court must be taken by a commission.

March 5th.

In the argument of this cause, Mr. *Winder*, for the claimant, stated, that there was an affidavit annexed to the record, which was taken under the order for farther proof, in the court below, but which, not arriving until after the decree of condemnation was pronounced, was ordered by

the circuit court, to be transmitted, *de bene esse*, for the consideration of this court. He farther stated, that he had additional proofs, taken since that time, to be used in this court; and he asked whether he should now be permitted to read these proofs, in order to show what was the nature of the evidence which existed, to clear away any former doubts in the cause.

[Mr. Chief Justice MARSHALL. The court is of opinion that the affidavit transmitted from the circuit court may now be read. But as to the new proof now offered by the claimant, it is the practice of this court to hear the cause in the first instance, upon the evidence transmitted from the circuit court, and to decide upon that evidence whether it is proper to allow farther proof. The new proof cannot, therefore, be now read; but, as the opposite party wishes it, the counsel may state the nature of the proof, though not the contents thereof in detail. If the |
p. 373 case shall ultimately appear entitled to farther proof, an order will be made for that purpose.]

March 10th.

Farther proof was ordered in the cause.

March 13th.

Mr. *D. B. Ogden*, for the claimant, offered to read affidavits, as farther proof, which had not been taken under a commission. But they were rejected by the court; the cause was continued to the next term; and the farther proof ordered to be taken under a commission, according to the rule of court of the present term.

Cause continued.[1]

The Friendschaft.—Winn et al. claimants.

(3 Wheaton, 14) 1818.

Informal and imperfect proceedings in the district court corrected and explained in the circuit court.

A bill of lading, consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not sufficient evidence to entitle the claimant to restitution; but is sufficient to lay a foundation for the introduction of farther proof.

The fact of invoices and letters of advice not being found on board, may induce a *suspicion* that papers have been spoliated. But even if it were *proved* that an enemy master, carrying a cargo chiefly hostile, had thrown papers over board, a neutral claimant, to whom no fraud is imputable, ought not thereby to be precluded from farther proof. |

p. 15 The native character does not revert, by a mere return to his native country, of a merchant, who is domiciled in a neutral country at the time of capture; who afterwards leaves his commercial establishment in the neutral country to be conducted by his clerks in his absence; who visits his native country merely on mercantile business, and intends to return to his adopted country. Under these circumstances, the neutral domicil still continues.

[1] Vide 2 Wheaton, Appendix, Note I.

British subjects resident in Portugal, (though entitled to great privileges,) do not retain their native character, but acquire that of the country where they reside and carry on their trade.

APPEAL from the circuit court for the district of North Carolina.

The brig Friendschaft was captured on a voyage from London to Lisbon, by the privateer Herald, and brought into Cape Fear, in North Carolina, where the vessel and cargo were libelled, in July, 1814, as prize of war. The commercial agent of his royal highness the Prince Regent of Portugal, interposed a claim to several packages, parts of the said cargo, on behalf of the respective owners, whom he averred to be Portuguese subjects and merchants residing in Portugal. The cargo consisted of many different shipments. Most of them were accompanied with bills of lading, directing a delivery to shipper or order. Of these a few were specially indorsed. Generally, however, they were without endorsements, or with blank endorsements only. A few shipments were accompanied with bills of lading, deliverable to persons in Lisbon, specially named in the bills. Very few were accompanied with letters or invoices. These, it was alleged in the claim, had probably been sent by the regular packet.

In August, 1814, the district court pronounced its | sentence, condemn- p. 16
ing as prize of war, 'all that part of the cargo for which no claim had been put in,' and 'all that part of the cargo which was shipped, as evidenced by bills of lading, either without endorsement or with blank endorsements, and not accompanied by letter or invoice, viz.

and that part appearing by the bill of lading to consist of forty bales of goods shipped by Moreira, Vieira, and Machado. Farther proof was ordered with respect to the residue of the cargo and the vessel.

From this sentence the claimants appealed to the circuit court. That court, in May, 1815, dismissed so much of the appeal as respected the brig, and that part of the cargo in respect to which farther proof was ordered, as having been improvidently allowed before a final sentence, and affirmed the residue of the decree, except in regard to the forty bales shipped by Moreira, Vieira, and Machado, with respect to which farther proof was directed, to establish the right of Francis Jose Moreira to restitution of one-third part thereof.

In April, 1816, farther proof was exhibited to the district court, in support of the claim for the parts of the cargo comprehended in the bills of lading numbered 108, 109, 141, 122, and 118, which bills being deliverable to merchants residing in Lisbon, whose names were expressed therein, were not endorsed. The farther proof was deemed sufficient, and restitution was ordered. The vessel and the residue of the cargo were condemned as prize of war.

p. 17 From so much of this sentence as awarded restitution, | the captors appealed; and in May, 1816, the circuit court decreed as follows: 'This court being of opinion that the former sentence of the district court, affirmed by the sentence of this court, rendered in May term, in the year 1815, having been left imperfect by omitting to recite the particular claims intended to be involved in the condemnation pronounced in the district court in terms of general description; and being also of opinion that the words "all that part of the cargo which was shipped as evidenced, by bills of lading, either without endorsement, or with blank endorsements, and not accompanied with letter or invoice," could be intended for those bills only which were to shipper or order, and not to those addressed to consignees named in the bill itself, is of opinion that there is no error in the sentence of the district court, and doth affirm the same.'

From this decree the captors appealed to this court. On the interposition of this appeal, the circuit court ordered that Joseph Winn, a British born subject, resident in Portugal, in whose behalf a claim was filed to No. 118, should be permitted to offer farther proof to the supreme court, to be admitted or rejected by that court.

Mr. *Wheaton*, for the appellants and captors. 1. The decrees of the district court of August, 1814, and of the circuit court of May, 1815, were final and conclusive, and ought to have precluded the district court from *subsequently* allowing farther proof as to these five claims.
p. 18 The terms of general description, | which are used by the judge of the district court, are equivalent to a particular designation of the claims intended to be condemned. 'All that part of the cargo which was shipped as evidenced by bills of lading, either without endorsement, or with blank endorsements, and not accompanied with letter or invoice' —is as effectually condemned by the sentence, as if the particular portions of the cargo thus documented had been specifically enumerated. The portions now claimed were *shipped as evidenced by bills of lading, either without endorsement, or with blank endorsements, and not accompanied with letter or invoice.* Consequently, they were included in the condemnation by the district court, which became final and conclusive upon the parties, by the decree of the circuit court rendered at May term, 1815, affirming that of the district court, and from which no appeal was entered. The subsequent proceedings, by which the district court admitted the claimants to farther proof, were, therefore, *coram non judice*, and utterly null and void. These branches of the cause were completely extinct, and could not be revived in any court. 2. And can this court have the least doubt of the justice and legality of this decree of the district court, as thus understood and explained? Is it possible that it is come to this, that in a court of prize, a mere bill of

lading to A. B. or assigns, unsupported by any other documentary evidence found on board, or by the oath of the master, shall be regarded as sufficient, even to entitle the party to farther proof? If goods shipped in the enemy's country can pass | the seas under so thin a veil as this, p. 19
the defects of which may afterwards be supplied by fabricated proofs, what security is there for belligerent rights? To what cause are we to attribute a transaction so unusual and irregular in commerce, but to the desire of the British shippers and *owners* to retain in their own hands the double power of stopping the goods *in transitu*, and of enabling the consignees to claim them in the prize court in case of capture? If this practice be tolerated by the court, the enemy shipper need resort to no complicated machinery of fraud in order to cover his property. He need do no more than put on board a bill of lading, unaccompanied by any invoice of the goods, or letter of advice showing in whom the property vests. In case of capture, nothing more will be necessary than to enter a claim in the name of the neutral consignee, and to demand an order for farther proof, and under that order to ransack the great *officina fraudis* to find the instruments of forgery and perjury; the aid of which will not become necessary, in case the shipment, thus made, escapes the vigilance and activity of the belligerent cruisers. Should they thus escape, the goods will be sold on account of the enemy shipper, and the proceeds of the sale will be remitted to him again by the same process; and thus the whole of the enemy's trade may be effectually screened from the perils of war. A bill of lading is an instrument too easily fabricated, to permit a court of prize to consider it *alone* as furnishing any proof, (even presumptive,) of property in the consignee. Whether the goods had been previously ordered by the Portuguese | consignee, or sent by the British shipper for sale on his own account, p. 20
they would equally have been accompanied by the same document, which is equivalent to *no evidence* whatever of proprietary interest *found on board*. Unless some such evidence be found on board, or a foundation be laid by the preparatory examinations of the captured crew, to let the claimants into farther proof, the necessary simplicity of the prize proceedings forbids a resort to extraneous testimony; and, as that originally before the court is insufficient to entitle the party to restitution, condemnation must ensue. Not only are the bills of lading unaccompanied by invoices and letters of advice, but they do not express the shipment to be 'for account and risk' of the consignees; and the freight is payable *in London*, and, (of course,) by the consignors. These circumstances distinguish this case from all those cases in which it has been determined, (under the municipal law,) that a bill of lading, expressing the shipment to be for account and risk of the consignee or his assigns, vests the property in him, subject only to the right of stoppage

in transitu; and the same circumstances liken it to those where the obligation on the part of the consignor to pay the freight was held to authorize him to bring an action against the carrier master for the goods, notwithstanding the form of the bill of lading.[1] It is wholly incredible, that the letters and invoices which ought to have accompanied these
p. 21 shipments, were sent by the Lisbon packet, (as suggested,) since | though *duplicates* of such papers may be sent, and frequently are sent, by conveyances, other than that of the ship in which the goods are transported, yet it is unusual and mercantilely irregular not to send the *originals* with the goods. The invoices are, by the revenue laws of most, if not all countries, indispensably necessary to enter the goods at the custom-house, avoiding the inconvenience of unpacking and valuing them. These papers are required by the law of nations, and the prize code of every country, to accompany the bill of lading, in order to fortify and confirm it. The absence of them does not, indeed, in all cases, furnish a substantive ground of condemnation, and exclude the party from farther proof. But in order to avoid this consequence, there must be some favourable presumption raised by the circumstances of the case, and the nature of the documentary evidence found on board. This presumption cannot exist in the case of a shipment in the enemy's country, of goods, the growth or manufacture of that country, under a bill of lading, unsupported by the oath of the master, and unaccompanied by any invoice, letter of advice, or other document whatever. The privilege of farther proof is imparted under the sound discretion of the court, where a foundation is laid for it, by the papers found on board, and the depositions of the captured persons. Neither the documentary evidence, nor the examinations *in preparatorio*, afford any foundation for it in the present case; since they do not furnish any, the slightest reason for
p. 22 believing, that it belongs as claimed. The court would be | opening a wide door for fraud, were it to extend the privilege of farther proof to such a case, which is neither one of honest ignorance or mistake. It is impossible that the parties should have been ignorant of what both the usage of trade, and the practice of prize courts, require. It is impossible that they should have omitted by mistake, what could not have been omitted but by design. The ancient French prize law, and the prize regulations of many other countries, do absolutely exclude farther proof, and condemn, or restore, upon the original evidence only. If by the more mitigated practice which this court has adopted, farther proof be *sometimes* allowed, it is not as of strict right, but of equitable indulgence, where the circumstances of the case lay a foundation for it, and the claimants do not forfeit the privilege by their own misconduct. 3. No *additional* farther proof ought to be admitted in this court, under the

[1] Davis et al. v. James, 5 *Burr.* 2680. Moore v. Wilson, 1 *T. R.* 659.

special orders of the circuit court, in the claim of Mr. Winn, giving him liberty to produce still farther proof (in addition to the farther proof exhibited to the district court) in this court, to be admitted, or rejected, at the discretion of the court. It is a settled principle of practice, that farther proof cannot be introduced in this court, unless, under the circumstances of the case, it ought to have been ordered in the court below. Such is the limitation to the admission of farther proof in the appellate tribunal, which has been established by the lords of appeal in England and adopted by this court. If, as has been contended, farther proof ought not to | have been admitted in the district court, the conse- p. 23
quence follows, that it ought not to be admitted here. But the lapse of time alone ought to preclude the claimants from this indulgence. They were fully apprized of the nature of the proof which their case required; they had it in their power to produce it; and after two years have elapsed, the necessity of suppressing the frauds which might be consequent upon such excess of indulgence, demands that the court should reject the additional farther proof now offered by them.[1] Mr. Winn's claim ought to be rejected, because, supposing his proprietary interest to be made out ever so clearly, he is a *British* born subject, who offers a claim upon the ground of his being a resident merchant of Portugal, although at the time of the first adjudication, he was not domiciled in that country. The claimant makes an affidavit *at London*, in *June*, 1815, in which he describes himself, as 'of the city of Lisbon, in Portugal, *now in London on mercantile business*,' swears to the property in himself, and that at the time of the shipment and capture, he was a domiciled subject of Portugal, and had resided in Lisbon for several years preceding the capture, and until the 12th of June, 1814,' when he left Lisbon for Bordeaux, and 'has *since* arrived,' (without saying *when*,) 'in this city *on mercantile business*;' that he still is a domiciled subject of Portugal, &c. 'The native character easily reverts,' says Sir W. Scott;[2] and it is so, not merely because | he says it, but from the very nature of things, p. 24
and the *gravitating tendency*, (if the expression may be allowed,) which every person has towards his native country. Here Mr. Winn was returning to his native country, shortly after the capture, and we may safely conclude, arrived there long before the first adjudication. There he continued until long after the peace, without resuming his acquired domicil in Portugal; and more than a year afterwards, we find him still resident in his native country. He was not *in transitu* to regain his *neutral* character, like Mr. Pinto in the case of the Nereide;[3] but he was *in transitu* to regain his native *hostile* character. He did regain it, and became a redintegrated British subject. That the party must

[1] The Dos Hermanos, 2 *Wheat.* 76. 98.
[2] La Virginie, 5 *Rob.* 98.
[3] 9 *Cranch*, 388.

be in *a capacity to claim* at the time of adjudication, as well as *entitled to restitution* at the time of sailing and capture, is an elementary principle which lays at the very foundation of the law of prize. It is alluded to by Sir W. Scott, in a leading case on this subject;[1] it is evinced by the anciently established formula of the test affidavit, and sentence of condemnation, both of which point to the national character of the party *at the time of adjudication*, as an essential ingredient in determining the fate of his claim. Mr. Winn had no *persona standi in judicio* at the time of the first adjudication; and unless he has been re-habilitated by the subsequent intervention of peace, and restored to his capacity to claim, by a species of the *jus postliminii*, his native character still remains fixed upon him, and his property must be condemned by relation back
p. 25 to the time of the first | adjudication, to which period every thing must be referred. 5. But even the Portuguese domicil of Mr. Winn will not avail to avert the condemnation of his property, because his native character is preserved, notwithstanding his residence and trade in Portugal. As the native domicil easily reverts, so also, it may with truth be affirmed, that it is with difficulty shaken off. Every native subject of a belligerent power is, *prima facie*, an enemy of the other belligerent. To repel this presumption, he must show, not merely that he has acquired a personal domicil in a neutral country, but that, under all the circumstances of the case, he is unaffected with the hostile character of his native domicil. The political relations between Great Britain and Portugal, completely recognize the privileged national character of British subjects in Portugal, which is preserved to them, in a manner analogous to that of European merchants in the East, who are held to take their national character from the factory to which they are attached, and from the European government under whose protection they carry on their trade.[2] Thus, also, Sir W. Scott states, in the Henrick and Maria,[3] that British subjects resident in Portugal retain their native national character in spite of their Portuguese domicil, even in the estimation of the enemy himself, (France,) and that they exercise an active jurisdiction over their own countrymen settled there. This peculiar immiscible character of British subjects in Portugal is
p. 26 strengthened | by the circumstance of that country having been, from the earliest periods of her national existence, the ally of Great Britain; and something more than a mere common ally, as Sir W. Scott observes, in the Flad Oyen.[4] The case of the *Danaos*, cited in a note to the Nayade,[5] in which the lords of appeal allowed a British born subject resident in the English factory at Lisbon, the benefit of a Portuguese character, so far as to legalize his trade with Holland, then at war with England,

[1] The Herstelder, 1 *Rob.* 97. [2] The Indian Chief, 3 *Rob.* 25.
[3] 2 *Rob.* 50. [4] 1 *Rob.* 135. [5] 4 *Rob.* 210

but not with Portugal, must be considered as a departure from principle, and imputed to some motive of national or commercial policy, operating on the lords at the time. Certain it is, that the *reasons* on which Sir W. Scott grounds the opinion expressed by him, are entitled to much more weight than is the mere *authority* of the lords, unsupported by any reasons whatever. This court, which is the supreme appellate prize tribunal of this country, will scrutinize carefully all the precedents settled in the British prize courts, (since the United States ceased to be a portion of the British empire,) and will regard rather the *reason* than the *authority* on which they are founded. Trace the treaties between Great Britain and Portugal, and it will be found that they impress something like a provincial dependence on Portugal, and an independent character on British subjects resident in that country. It is to the lights of history that we must resort to account for compacts so singularly unequal. Before the subjugation of Portugal by Spian, the ancient | Portuguese p. 27
kings granted special immunities to English merchants settled in their dominions. The want of capital in a poor and comparatively barbarous country, made it necessary to encourage the establishment of foreign merchants in *factories*, which were essential to their protection, on account of the difference of language, manners, religion, and laws, almost (if not quite) as great as between Christendom and the countries of the East.[1] On the restoration of the monarchy by the house of Braganza, in 1640, John IV. was supported by Charles I. of England, who was the first prince that acknowledged the new Portuguese monarch, and entered into a treaty with him. Under the English commonwealth, this treaty was renewed by Oliver Cromwell, whose energy in maintaining the foreign influence and commercial interests of his country is so well known. Charles II. married the Infanta of Portugal; confirmed all former treaties; and made a new and perpetual one with Alfonzo VI. Under his mediation and guarantee, Spain acknowledged the independence of Portugal; which Great Britain has since constantly maintained, by succouring Portugal against her enemies. In return for a friendship so ancient, so unalterable, and so beneficial, Portugal has lavished upon the subjects of Great Britain the most precious commercial privileges; and for them has even relaxed her commercial monopoly, and opened to them the *sanctum sanctorum* of her possessions in the two Indies. These privileges have been uniformly | revived and renewed in every successive p. 28
treaty which has been formed between the two countries, and may be enumerated under the following heads. *First.* Prizes made by British subjects, from nations at peace with Portugal, may be carried into the Portuguese ports for adjudication, and condemned whilst lying there.[2]

[1] 2 *Posthelwaite's Dict. of Trade and Commerce*, art. *Treaties*.
[2] The Henrick and Maria, 4 *Rob.* 50.

If the ports of Portugal can be so far considered as British, as that British prizes may be carried into them, and condemned, surely they must be considered such in respect to British subjects residing and trading there. The rule of reciprocity or amicable retaliation may be extended to *them* (being *enemies*,) though it may not be extended *by the court* to the *subjects of Portugal*, (because they are *friends*,) and the judicial department cannot reciprocate to, or retaliate on them, the unjust proceedings of their nation. *Second.* Portugal is bound, by treaty, to deliver up British vessels captured and brought into her ports by the enemies of Great Britain, but her friends.[1] *Third.* British subjects resident in Portugal are exempt from the ordinary jurisdiction of the country; and are amenable only to the judge conservator appointed by themselves, who has cognizance of all *civil* causes in which they are concerned; and the ordinary authorities of the country cannot proceed against them in *criminal* cases, without a permission in writing from the judge conservator, except only where the offender is taken *flagrante delicto*.[2]

p. 29 *Fourth.* | The Portuguese courts of probate, or orphans' courts, have no authority whatever, in the distribution of the effects of British subjects deceased, in Portugal, but the same is referred to the judge conservator, under whose superintendence administrators are appointed by a majority of the British merchants resident in the place.[3] *Fifth.* British subjects in Portugal, have the privilege of being paid their debts due to them by Portuguese subjects, whose property may be seized by the inquisition, or the king's exchequer.[4] *Sixth.* They are exempted from the operation of the fundamental law of the Portuguese monarchy, which has immemorially excluded every other religion from Portugal, except the Roman Catholic; and they are permitted to enjoy their own religious principles and worship as Protestants.[5] *Seventh.* This favoured nation are also exempted from all the monopolies, and other exclusive privileges, with which the internal and external commerce of Portugal and her colonies are cramped and restrained, and to which Portuguese subjects are exposed. The only exception to this immunity is the crown farm, for the exclusive sale of certain precious productions.[6] The treaty of 1810, now subsisting, confirms and renews all the privileges and immunities granted by former treaties, or municipal regulations, except only the stipulation that free ships should make free goods.

p. 30 These privileges and immunities segregate British residents in | Portugal from the general society, and from the commercial, political, and ecclesiastical regulations of the country. They distinguish those residents from the other inhabitants, as much as the merchants of Christendom

[1] 2 *Chalmer's Coll. Treat.* 279.
[2] 2 *Chalmers*, 271. Treaty of 1674, art. 7. 13. Treaty of 1810, art. 10.
[3] 2 *Chalmers*, 271. *Ib.* 281. [4] 2 *Chalmers*, 260. [5] 2 *Chalmers*, 265.
[6] Treaty of 1810, art. 3.

are distinguished from the natives in the oriental countries. The privileged character of Christians, established in those countries, depends as much upon the conventional law, as does that of British subjects settled in Portugal. The treaties and capitulations between the powers of Christendom and the Porte secure to the subjects of the former, privileges not more extensive than those which are now enjoyed, and have been enjoyed from time immemorial, by the British in Portugal.[1] It is true, that by the treaty of 1810, art. 26, his Britannic majesty renounces the right of establishing *factories* or corporations of merchants in the Portuguese dominions, but there is a proviso, that this concession ' shall not deprive the subjects of his Britannic majesty, residing within the dominions of Portugal, of *the full enjoyment, as individuals engaged in commerce, of any of those rights and privileges which they did or might possess, as members of incorporated commercial bodies ;* and, also, that the trade and commerce carried on by British subjects shall not be restricted, annoyed, or otherwise affected, by any favours within the dominions of Portugal ; ' and in the case of *Mr. Fremeaux*, the lords of appeal in England decided, that the claimant was to be considered as a Dutchman, because he carried on trade at Smyrna, under | the protection p. 31
of the Dutch consul, although it was proved in that gentleman's case, that there was no Dutch *factory* at Smyrna, and that the Dutch merchants there are not incorporated.[2]

Mr. *Gaston*, for the respondents and claimants. 1. On the first point the claimants have to encounter a difficulty purely technical, which cannot pretend to a foundation in justice, and which, indeed, aims to prevent a decision upon the merits of the controversy. If this difficulty can neither be surmounted nor escaped without a violation of the established principles and rules of jurisprudence, the claimants must submit without repining. But it will be impossible for the friends to the repose of nations, and to the impartial administration of justice in the courts of belligerents, not to regret, that the highest tribunal in our land should find itself so fettered with forms, as to be unable to do what shall appear to them to be right ; as to be compelled to condemn as prize of war what the inferior tribunals shall have restored, (in their opinion *justly*,) as neutral property. The captors' objection is founded on a *literal* exposition of the decree of August, 1814, inconsistent with its obvious meaning. However desirable it may be that precision should be used in drawing up the decrees of judicial tribunals, yet the infirmity of human nature, and the imperfection of human language, alike demand that these decisions should not be perverted by verbal criticism from their substantial import. No one can doubt | the meaning of the sentence of p. 32

[1] *Valin, Sur l'Ordon.* 234, 235. 2 *Chalmers*, 436.
[2] Cited in the Indian Chief, 3 *Rob.* 32. *Ib.* App. Note No. I. 295.

August, 1814. No one can hesitate to say, that it designed not to condemn such parts of the cargo as were evidenced by bills of lading addressed to consignees, specially named in them. This design appears as distinctly as though it had been expressed in the most formal terms. The court exempts from condemnation, and reserves for farther proof, all the cases of bills of lading deliverable to shipper or order, which are specially *endorsed* to consignees. *A fortiori*, it could not but exempt from condemnation, those where the bills of lading are addressed to consignees specially named in the bills of lading. It is the order of the English shipper for the delivery of the goods to the Portuguese consignee, that raises the doubt where resides the proprietary interest; whether in the shipper or in the consignee. And unquestionably the probability that such interest in the consignee is, *at least*, as strong where the consignment is original, and on the face of the bill of lading, as where it is made by an endorsement of the bill. The sentence of August, 1814, which is insisted on as condemning the property in question, could not have that effect until it was completed. A blank was purposely left for the insertion of the parts of the cargo intended to be condemned. Until this blank was filled up, or something done by the court equally definitive and precise, the sentence was necessarily imperfect, both in substance and in form. This imperfection continued as to the district court until August term, 1816, and then the property in question was not only not condemned, but ordered to be restored. The affirmance of the sen-
p. 33 tence of August, 1814, by | the circuit court was in general terms. It cannot, therefore, have any other effect than if the sentence affirmed had been repeated *in totidem verbis*. The sentence of condemnation, therefore, of the circuit court of May, 1815, was incomplete; and remained so until November term, 1816, when in direct terms it was declared that it should not apply to the present claims. Whatever informalities or errors of proceeding may have been had below, yet as the property to which the claims apply is still in the custody of the law, and the whole case in relation to it is now before this court, *all* these errors and irregularities will be so corrected, as to make the final decision of the controversy, and disposition of the property, conform to the rights of the parties litigant. Whether the district court, in August, 1814, did or did not condemn this part of the cargo; whether it did or did not decree that farther proof should be heard in relation to it; yet if it ought not to have been condemned—if farther proof ought to have been received in relation to it—this court will receive such farther proof. 2. But, it is contended, that whatever might have been the meaning of the sentence of the district court of August, 1814, affirmed in the circuit court in May, 1815, it *ought* to have condemned the goods in question, and not to have let in the claimants to farther proof. And this position is

founded on the assertion that the bills of lading, No. 108, 109, 141, 122, and 118, furnish no evidence whatever of proprietary interest in the consignees, and on the apprehension that the admission of farther proof in cases so circumstanced might destroy all security for belligerent | rights. p. 34
And, does a bill of lading furnish no evidence, not even presumptive, of proprietary interest in the consignee? It is understood, and such was the language of this court in the case of the St. Joze Indiano,[1] that in general the rules of the prize court, as to the vesting of property, are the same with those of the common law. Now, 'every authority which can be adduced, from the earliest period of time down to the present hour, agree, that at law, the property does pass as absolutely and as effectually, (by a bill of lading,) as if the goods had been actually delivered into the hands of the consignee.'[2] 'If upon a bill of lading,' (says Lord Hardwicke, in Snee v. Prescott,[3]) between merchants residing in different countries, the goods be shipped and consigned to the principal expressly in the body of the bill of lading, that vests the property in the consignee.' The right of the consignor to stop goods in transitu is not founded on any presumed property in the consignor, but necessarily supposes the property to be in the consignee; for, 'it is a contradiction in terms, to say a man has a right to stop his own goods in transitu.' It is a right founded wholly on equitable principles, 'which owes its origin to courts of equity—and, the question is not whether the property has vested under the bill of lading, for that is clear; but whether on the insolvency of the consignee, who has not paid for the goods, the consignor can countermand the consignment, | or, in other words, *devest* the property p. 35
which *was vested* in the consignee.'[4] Unless, therefore, a totally different rule, as to the vesting of property, is to be asserted in a court of prize from that which is established at law, a bill of lading absolutely vests the property in the consignee, and, of course, is the appropriate and definite evidence of his proprietary interest. But, it is said, these bills of lading do not express the shipment to be for the account and risk of the consignees, and state that the freight has been paid in London, and, 'of *course*, by the consignors.' Surely it is not seriously contended, that the omission to declare the shipment to be on account of the consignees, and the declaration that the freight has been paid in London, and, 'of course, by the consignors,' could have been designed to secure to the consignors the right of stopping in transitu? This right is founded on *principles of equity* which give it a direct application to shipments made on account of the consignees, and which have no connection whatever with the legal consequences of the payment of freight. Let us see,

[1] 1 *Wheat.* 212.
[2] Per Buller, J. in *Dom. Proc.* Lickbarrow *v.* Mason, 6 *East*, 23. Note.
[3] 1 *Atk.* 245.
[4] 6 *East*, 28. Note.

however, what inferences may be fairly drawn from the peculiarities which are noticed in the bills of lading—They omit to state that the shipment is on account and risk of the consignees. Shall we thence infer that the shipment is on account and risk of the consignors?—This is not the inference of the law. If the bill of lading vests the property in the consignee, he, of course, sustains the peril of the shipment, unless
p. 36 there be an agreement to the contrary. It would be a singular | absurdity, indeed, if the law, upon the instrument, *presumed* that the consignee was the owner, and at the same time *inferred* that he did not bear the ordinary risks of ownership. Where the shipment is on account and at the risk of the consignor, and not of the consignee, there it may be proper to express the fact, because it is opposed to the legal presumption—But that an omission to state, what without statement is presumed, can be converted into an argument against the presumption—will be an instance of intellectual dexterity, rather fitted to surprise than to satisfy the inquirer after truth. A bill of lading evidences an agreement made by the master with the shipper for the delivery of the goods to the consignee. *His* undertaking is simply to carry the goods for the stipulated price to the consignee. *He* knows not that the consignee is to sustain the risk of the shipment—*He* cannot, therefore, with propriety, aver it in his contract. If, indeed, the consignor is to sustain the risk, and wishes this fact to be stated in the master's undertaking, then has he the full evidence which warrants the insertion of such a clause in the bill of lading. And, accordingly, such is the mercantile usage. Bills of lading ordinarily express account and risk when they are not the account and risk of the consignee. But it is otherwise with *invoices*—These are documents passing between the parties to the shipment, and contain the declaration of the consignor to the consignee. These, therefore, declare, however it may be, at whose account and hazard the shipment is made. The other peculiarity noticed in the bills of lading
p. 37 is, that the | freight is paid in London, and, '*of course*, by the consignors.' If this corollary, thus summarily deduced, of a payment by the shippers, mean no more than a payment by the consignees through the shippers as their immediate agents at London, it may be admitted as probable, and, at all events, as harmless. But, if it mean a payment by the shippers as principals, or on their own account, then it is denied to follow from the proposition which it claims as its premises. But the peculiarities, thus examined, are relied on as constituting a support on which to rest the doctrine contained in the cases of *Davis et al.* v. *James*,[1] and *Moore* v. *Wilson*,[2] which are cited, (as it would seem,) to prove, that where the consignor pays the freight, the bill of lading does not vest the property in the consignee! It is not material to inquire how far these cases would

[1] 5 *Burr.* 2680. [2] 1 *T. R.* 659.

now stand the test of a strict scrutiny. It is but doing justice, however, to the great men who decided them, to say, that they establish no such doctrine. Lord Mansfield expressly declares, that he does not proceed at all on the ground of proprietorship, but simply on the agreement of the carrier. And Lord Kenyon, in *Dawes* v. *Peck*,[1] states, that the doctrine which they furnish is no more, than, that the consignor may bring an action for breach of contract against the carrier on his agreement, where the consignor is to be at the *expense of the carriage*, ' where he stands in the character of an *insurer* to the consignee for the safe arrival of the goods.' It is alleged, that if the interest in these claims | were *bona fide* neutral, it is incredible, that the invoices and letters p. 38
would not have accompanied the shipment. Is it not equally probable, where the shipment is not on neutral account, or partly on neutral and partly on hostile account, and *there is no attempt at deception*, that it would have been accompanied with letters and invoices ? Yet in the vast multitude of the shipments clearly on enemy account, made by this ship, and which have been condemned without a controversy, there is not one in ten thus accompanied. The packet sails between London and Lisbon with a regularity, certainty, and frequency, little short of what takes place in transmissions by mail. It is the great and established medium of conveyance, established by treaty stipulations, for passengers and letters. Is it strange, therefore, that all the communications between the shipper and the owner of the goods, except a copy of the bill of lading, (which at once evidences the property, and is directory to the master,) should have been sent by this certain and regular and official medium of conveyance ? If duplicates of these communications had accompanied the shipments in question, this unusual caution might have been construed into a proof of guilt, and these additional evidences of neutral proprietorship stigmatized as the badges of fraud. But it is alleged, also, that the bills of lading are not verified. The only individual of the crew examined by the commissioners, is the master, and he supports the bill of lading as far as can be expected of a carrier-master. In answer to the 13th interrogatory, he declares that the bills of lading are not false or colourable; and in answer to the 20th, | that he presumes p. 39
the goods shipped belong to the respective consignees. The rights of belligerents are not the only rights deserving of the notice, and entitled to the protection of courts of prize. Though human testimony may sometimes be corrupt, and often fallacious, it is by human testimony alone, that human tribunals can hope to eviscerate the truth. Condemnation should take place only when the fact of enemy's property has been ascertained ; and where that fact is doubted, proof should be resorted to. These principles have received the countenance of all those

[1] 7 *T. R.* 330.

engaged in the administration of public law, whom the civilized world (cruisers excepted) regard with reverence. They will be found stated with simplicity and perspicuity in the famous British answer to the Prussian memorial, and communicated to the American government in 1794, as the basis of the proceedings in British courts of Admiralty; and which has been adopted by this court as the substratum of its own conduct in cases of prize.—3. When it is recollected that the claimants have sought to furnish proof, both from the port of shipment and the port of destination, from London and from Lisbon; that during the war, the means of procuring such proof from Europe and bringing it to the United States were unfrequent and uncertain; and that delay will not be occasioned by listening to the additional proof now tendered, it is believed that the court will not refuse to hear it. The case of the Bernon,[1] shows that the court, after receiving farther proof, may order
p. 40 additional proof, if requisite to enlighten its judgment; | and the case of the Frances[2] is an authority in point, that the *appellate* court may order additional proof, if the farther proof on which the cause has been heard below is defective. May not the appellate court then hear it, if to prevent injurious delays it be prepared in anticipation?—4. The only inquiries of fact, as to the character of the claimant, according to the rules laid down by Sir William Scott, in the *Herstelder*,[3] are, was he at the time of seizure entitled to restitution; and is he, at the time of adjudication, in a capacity to claim. The present capacity of the claimant is without doubt. His right to restitution must be tested by his national character at the time of seisure, on the 10th of May, 1814. But the objection is founded entirely on a misconception of the meaning of the affidavits. Whether the facts testified be true or not, must depend on the veracity of the deponents. If they are to be believed, they prove a residence of the claimant as an established merchant at Lisbon, for several years preceding the seizure, and up to the 12th of June thereafter; the leaving of Lisbon on mercantile business, *animo revertendi*, on the 12th of June, 1814, and the continuance of his domicil, residence, and establishment there, and a continued purpose of actually returning thither, up to the date of the affidavits.—5. It must be conceded, that for commercial purposes, among the civilized nations of Europe and the West, the national character of an individual is *ordinarily* that of the country in which he resides. No position is better established than this,
p. 41 that if a person goes to another country, and there engages in | trade and takes up his residence, he is by the law of nations, to be considered as a merchant of that country. This general rule applies to the case of British merchants domiciled in Portugal. They owe allegiance to the government, are protected by its laws, mingle intimately with the

[1] 1 *Rob.* 86. [2] 8 *Cranch*, 308, 353. [3] 1 *Rob.* 97.

natives in all the social and domestic relations, cherish Portuguese industry, increase Portuguese capital, and contribute to the revenue of Portugal. It is true that a very intimate commercial connexion has long subsisted between Portugal and Britain, and that the subjects of the latter are encouraged to settle in the Portuguese dominions, by many advantageous regulations in favour of their traffic. But it is by no means true that any British authority is exercised in Portugal, or that Portugal can be viewed as the dependant province of Britain. *First.* There is no authority for the assertion that the ports of Portugal are open in war for the adjudication of British captures made from nations at peace with Portugal. An irregular practice formerly obtained to that effect, to which sir Wm. Scott alludes in the Henrick and Maria; but it was sanctioned *neither by treaty nor decree.* The treaty of 1810 is utterly silent on that head, and it is a matter of notoriety, that on the breaking out of the late war between the United States and Great Britain, a royal decree was issued, forbidding the cruisers of belligerents from bringing their prizes into the dominions of Portugal, which was enforced throughout the war. *Second.* Portugal is not bound by treaty to deliver up British vessels brought into her ports which have been taken by the enemy of Britain. | The 30th article of the present treaty p. 42
limits the obligation to the restitution of property *plundered by pirates.* And this obligation is reciprocal. *Third.* British residents are not exempt from the jurisdiction of the Portuguese tribunals. They have the privilege indeed of choosing *from among the commissioned judges of the realm* one who is to be presented to the king for his approbation as their judge conservator, and who, if approved, is so appointed. The authority of this judge, (who is usually selected because of his knowledge of the English language,) reaches only to the trial *in the first instance* of commercial disputes brought before him by British merchants, and is ever subordinate to the higher tribunals of justice established in the realm, who, *in all cases,* possess over him an appellate jurisdiction. The privilege is not peculiar to the British, but is extended to every friendly European nation. *Fourth.* The provision of the treaty of 1654, relative to the appointment of administrators to British residents dying intestate, is not renewed in the treaty of 1810. There is in lieu of it a reciprocal stipulation, (Art. 7th.) for the disposal, by the subjects of both nations, of their personal property by testament. *Fifth.* The provision for applying the effects seised by the Inquisition to the payment of the debts due the British creditor, is but a dictate of justice, and probably places these creditors on the *same* footing with native creditors. It is not found in the treaty of 1810. *Sixth.* There is nothing extraordinary in the mutual stipulation for the tolerance, by each, of the religion of the subjects of the other, as far as it may consist with the

p. 43 laws of their respective realms. *Seventh.* Nor is it unusual | to grant to the subjects of other nations, an exemption from monopolies obligatory on native merchants. It is perfectly familiar to the court, that under the British treaty of 1795, such an exemption was accorded to American merchants from the monopoly of the British East India Company. And in the treaty of 1810 it will be seen that the stipulations are reciprocal. There is much difficulty in ascertaining the precise nature of the immunities enjoyed by British merchants in Portugal, at the date of the treaty of 1810, because the practice had been to grant them occasionally by *alvaras.* These are temporary proclamations, which have effect, only, for a year and a day. It is very certain that some privileges heretofore granted, were not then possessed. For instance, the alvara of 1717 exempts Englishmen from certain taxes to which the natives are liable, while the 7th article of the treaty of 1810, provides that they shall be liable to the same taxes, (and no other) as are imposed on the natives of Portugal. The probability is, that the most important of these immunities are especially enumerated in the treaty. It is unnecessary, however, to proceed further with this examination. Enough appears to show that the attempt to take the case of British merchants resident in Portugal, out of the general rule applied to domicil among civilized nations, whatever admiration may be due to its boldness, cannot receive the sanction of an enlightened court. The analogy between such merchants and Europeans in Turkey, who, there, neither sustain their original character, nor take the character of the people within whose
p. 44 territories they sojourn, but owe their name and political | existence to the *factory* and *association* under whose protection they carry on a precarious traffick—who are viewed as a people exempt from Turkish dominion,[1] and who never mix with the natives in any social or domestic concern—is too forced and unnatural to afford a basis for any arguments applicable to them both. No authority is cited in support of this objection, other than a remark of Sir William Scott in the Henrick and Maria, which must be understood *secundum subjectam materiam.* He is there speaking of the validity of a condemnation *in England* of an enemy's ship, carried into Lisbon or Leghorn—into the port of a very close and intimate ally. But in opposition to it there are great authorities. The case of the Armenian merchants resident at Madras under special privileges, who were, nevertheless, subjected to the general rule of domicil, bears directly upon it.[2] The case of the Nayade, which applies the commercial rule of domicil to Prussian merchants in Portugal, also bears upon it.[3] The case of the Danaos,[4] decided in March, 1802, at a time when the objection was stronger than at present, is directly in

[1] See Consular Certificate in the Herman, 3 *Rob.* Appen. I. 295.
[2] The Angelique, 3 *Rob.* Appen. B. 294. [3] 4 *Rob.* 206. [4] 4 *Rob.* 210.

point, and of the highest prize tribunal in England. In the St. Joze Indiano[1] it was expressly decided by one of the learned judges of this court, that British residents in the dominions of Portugal take the character of their domicil, and as to all third parties, are to be deemed Portuguese subjects. This decision was acquiesced in by the counsel for the captors. In the case of the Antonio Johanna, such | was considered p. 45
the settled rule; and, accordingly, restitution was made by this court to Mr. Ivers, a resident British merchant, at St. Michael's, one of the firm of Burnet & Ivers, of the moiety claimed in his behalf as a Portuguese subject.[2] The counsel who now advances this objection, declined then to bring it forward.

February 6th.

Mr. Chief Justice MARSHALL delivered the opinion of the court, and after stating the facts, proceeded as follows:

The appellants contend, 1st. That the sentence pronounced by the district court in August, 1814, which was affirmed by the circuit court in May, 1815, condemned finally, the packages for which a decree of restitution was afterwards made, and that the subsequent proceedings were irregular, and in a case not before the court. 2dly. That upon the merits, farther proof ought not to have been ordered, and a condemnation ought to have taken place.

On the first point, it is contended, that these goods, having been comprehended in invoices not endorsed, nor accompanied with letters of advice, are within the very terms of the sentence of condemnation, and must, consequently, be considered as condemned.

The principle on which this argument was overruled in the court below, is to be found in its sentence. The district court, in its decree of 1814, did not intend to confine its description of the property condemned, to the general terms used in that decree, but did intend to enumerate the particular bills to | which those terms should apply. This is con- p. 46
clusively proved by reference to the subsequent intended enumeration, which is followed by a blank, obviously left for that enumeration. Had the enumeration been inserted as was intended, the particular specification, would undoubtedly have controlled the general description which refers to it. The unintentional and accidental omission to fill this blank, leaves the decree imperfect in a very essential point; and if the case, and the whole context of the decree can satisfactorily supply this defect, it ought to be supplied. This court is of opinion, that no doubt can be entertained respecting the bills with which the district court intended to fill up the blank. The condemnation of shipments evidenced by bills of lading, with blank endorsements, or without endorsement, could

[1] 2 *Gallis.* 268. 292. [2] 1 *Wheat.* 159.

apply to those only which required endorsement, or which were in a situation to admit of it. These were the bills which were made deliverable to shipper, or to the order of the shipper. Bills addressed to a merchant, residing in Lisbon, could not be endorsed by such merchant, until the vessel carrying them should arrive at Lisbon. Consequently, such bills could not be in the view of the judge, when condemning goods, because the bills of lading were not endorsed; and, had he completed his decree, such bills could not have been inserted in it. No conceivable reason exists, for admitting to farther proof, the case of a shipment, evidenced by a bill of lading, made deliverable to shipper, or order, and endorsed to a merchant, residing in Lisbon; and at the same time con-
p. 47 demning, without admitting to farther proof, the same | shipment, if evidenced by a bill of lading, made deliverable, in the first instance, to the Lisbon merchant. No. 108, for example, is made deliverable at Lisbon, to Segnior Jose Ramos de Fonseco, and is consequently not indorsed. It is contended, that these goods are condemned. But had the bill been made deliverable, to shipper, or order, and endorsed to Segnior Jose Ramos de Fonseco, farther proof would have been admitted.

Nothing but absolute necessity could sustain a construction, so obviously absurd. This court is unanimously of opinion, that justice ought not to be diverted from its plain course, by circumstances so susceptible of explanation, that error is impossible; and that when the decree was returned to the district court of North Carolina, with the blank unfilled, that court did right in considering the specification intended to have been inserted, and for which the blank was left, as a substantive and essential part of the decree, still capable of being supplied, and in acting upon, and explaining the decree, as if that specification had been originally inserted.

This impediment being removed, the cause will be considered on its merits.

It is contended, with great earnestness, that farther proof ought not to have been ordered, and that the goods which have been restored, ought to have been condemned as prize of war. In support of this proposition, the captors, by their counsel, insist that the rights of belligerents would be sacrificed, should a mere bill of lading, consigning the goods
p. 48 to a neutral, | unaccompanied by letter of advice or invoice, let in the neutral claimant to farther proof.

It is not pretended, that such a bill would of itself justify an order for restitution; but it certainly gives the person to whom it is addressed, a right to receive the goods, and lays the foundation for proof, that the property is in him. It cannot be believed, that, admitting farther proof in the absence of an invoice or letter of advice, endangers the fair rights of belligerents. These papers are so easily prepared, that no fraudulent

case would be without them. It is not to be credited, that a shipper in London, consigning his own goods to a merchant in Lisbon, with the intention of passing them on a belligerent cruizer as neutral, would omit to furnish a letter of advice and invoice, adapted to the occasion. There might be double papers, but it is not to be imagined, that papers so easily framed, would not be prepared in a case of intended deception.

It is unquestionably extraordinary, that the same vessel which carries the goods should not also carry invoices, and letters of advice. But the inference which the counsel for the captors would draw from this fact, does not seem to be warranted by it. It might induce a suspicion, that papers had been thrown overboard; but in the total absence of evidence, that this fact had occurred, the court would not be justified in coming positively to such a conclusion. Between London and Lisbon, where the voyage is short and the packets regular, the bills of lading and invoices might be sent by the regular conveyances. But were it even admitted that a belligerent master carrying a | cargo chiefly belligerent, had thrown papers over board, this fact ought not to preclude a neutral claimant, to whom no fraud is imputable, from exhibiting proof of property. In the case before the court, no attempt was made to disguise any part of the cargo. By far the greater portion of it was confessedly British, and was condemned without a claim. The whole transaction with respect to the cargo, is plain and open; and was, in the opinion of this court, a clear case for farther proof. p. 49

The farther proof in the claims 108, 109, 141, and 122, consists of affidavits to the proprietary interest of the claimants; of copies of letters, in some instances ordering the goods, and in others advising of their shipment; and of copies of invoices—all properly authenticated. This proof was satisfactory, and the order for restitution made upon it was the necessary consequence of its admission.[1] |

[1] *M. Bonnemant*, in his commentary upon *De Habreu*, makes the following remarks:

'Parmi les pièces dont un navire doit être pourvu pour la régularité de as navigation, il en est de deux sortes; les unes servent à prouver la neutralité du navire, les autres celle de la cargaison.'

'Celles relatives à la cargaison sont les connoissments, les polices de chargement, les factures. Toutes ces pièces font pleine et entière foi, si elles sont en bonne et due forme. Toute ne sont pas d'absolue nécessité; comme elles sont correlatives, elles se suppléent entre elle et peuvent être supplées par d'autres équivalentes. Mais si l'on en découvre d'autres qui les démentent, s'il se rencontre des double expéditions on autres documens capable d'ebranler la confiance, la prèsomption de fraude se change dès-lors en certitude, on ne présume pas simplement le navire ennemi, on le suppose.

'La preuve de la neutralité est toujours à la charge du capturé.

'Cette preuve ne peut et ne doit résulter que des paers trouvés à bord; * toute

* The French prize practice not allowing farther proof, but acquitting or condemning upon the original evidence consisting of the papers found on board and the depositions of the captors and captured. The only exception to this rule is, where the papers have been spoliated by the captors, or lost by shipwreck, and other inevitable accidents. *Valin, Traité des Prises*, ch. 15. n. 7. But the Spanish law admits of farther proof in case of doubts arising upon the original evidence. *De Habreu*, part 2. ch. 15.

p. 50 In the claim to No. 118, made for Joseph Winn, the farther proof was not so conclusive. It consisted of the affidavit of the claimant to his proprietary interest, and to his character as a domiciled Portuguese subject, residing and carrying on trade in Lisbon. The affidavit was made in London on the 29th day of June, 1815, but states the claimant to have been at his fixed place of residence in Lisbon, at the time of the capture, where he had resided for several years preceding that event,
p. 51 and where he continued until the 12th of June, 1814, when he left | Lisbon for Bordeaux, and has since arrived in London on mercantile business. That he is still a domiciled subject of Portugal, intending to return to Lisbon, where his commercial establishment is maintained, and his business carried on by his clerks until his return. To a copy of this affidavit is annexed that of Duncan M'Andrew, his clerk, made in Lisbon, who verifies all the facts stated in it.

This property was also restored by the sentence of the district court, and affirmed in the circuit court. On an appeal being prayed, the circuit court made an order, allowing this claimant to take farther proof to be offered to this court. The proof offered under this order consists of a special affidavit of one of the shippers, of sworn copies of letters ordering the shipment, and of the invoice of the articles shipped.

This claim not having been attended, when the sentence of restitution was made, with any suspicious circumstances, other than the absence of papers which have since been supplied, and which was probably the result solely of inadvertence, this court is of opinion, that the farther proof now offered, ought to be received. It certainly dissipates every doubt respecting the proprietary interest. The only question made upon it respects the neutral character of the claimant.

It has been urged, that the native character easily reverts, and that by returning to his native country, the claimant has become a redinte-
p. 52 grated British subject. | But his commercial establishment in Lisbon still remains; his mercantile affairs are conducted in his absence by his clerks; he was himself in Lisbon at the time of the capture; he has come to London merely on mercantile business, and intends returning to Lisbon. Under these circumstances, his Portuguese domicil still continues.

autre indirecte ne peut être reçue ni pour ni contre, c'est la disposition de l'art.11. du règlement du 26 Juillet, 1778, et des précédens qui veulent qu'on n'ait égard qu'aux *pièces trouvées à bord*, et non à celles qui pourroient être produites après la prise.

'C'est au capteur à prouver ensuite *l'irregularité* des pièces, à les discuter de la manière qu'il juge convenable pour en demontrer la fraude et la simulation.

'Quant aux irregularités que peuvent contenir certaine pièces de bord, ce n'est pas à des omissions de forme usitées que les tribunaux doivent s'attacher, c'est par l'ensemble des pièces, et sur tout par la vérité des choses qui en résulte, qu'ils doivent se déterminer; l'expérience n'a que trop démontré que la plus grande régularité dans les papiers mas quoit souvent la fraude et la simulation, *nimia precautio dolus*.' *Bonnemant's Translation of De Habreu, Tom.* 1. p. 28.

But, it is contended, that the connection between Britain and Portugal retains the British character, and the counsel for the captors has enumerated the privileges of Englishmen in that country.

These privileges are certainly very great; but, without giving them a minute and separate examination, it may be said, generally, that they do not confound the British and Portuguese character. They do not identify the two nations with each other, or affect those principles on which, in other cases, a merchant acquires the character of the nation in which he resides and carries on his trade. If a British merchant, residing in Portugal, retains his British character when Britain is at war and Portugal at peace, he would also retain that character when Portugal is at war and Britain at peace. This no belligerent could tolerate. Its effect would be to neutralize the whole commerce of Portugal, and give it perfect security.

Sentence affirmed.

The Star.—Dickenson et al. claimants.

(3 Wheaton, 78) 1818.

An American vessel was captured by the enemy, and after condemnation and sale to a subject of the enemy, was recaptured by an American privateer. Held, that the original owner was not entitled to restitution on payment of salvage, under the salvage act of the 3d of March, 1800, ch. 14. and the prize act of the 26th of June, 1812, ch. 107. |

By the general maritime law, a sentence of condemnation completely extinguishes the title of the original proprietor. P. 79

By the British statute of the 13th George II. ch. 4. the *jus postliminii* is reserved *to British subjects* upon all recaptures of their vessels and goods by British ships, even though they have been previously condemned, except where such vessels, after capture, have been set forth as ships of war.

The statute of the 43d George III. ch. 160. s. 39. has no farther altered the previous British laws, than to fix the salvage at uniform stipulated rates, instead of leaving it to depend upon the length of time the recaptured ship was in the hands of the enemy.

Neither of these statutes extend to neutral property.

The 5th section of the prize act of the 26th June, 1812, ch. 107. does not repeal any of the provisions of the salvage act of the 3d of March, 1800, ch. 14. but is merely affirmative of the pre-existing law.

By the law of this country the rule of reciprocity prevails upon the recapture of the property of friends.

The law of France denying restitution upon salvage after 24 hours possession by the enemy, the property of persons domiciled in France is condemned as prize by our courts on recapture, after being in possession of the enemy that length of time.

APPEAL from the circuit court for the district of New-York.

It appeared by the libel, claim, evidence, and admissions of the parties in this cause, that the ship Star was captured by the American

privateer Surprise, on the high seas, on the 27th of January, 1815. That the ship Star was then on a voyage from the British East Indies to London. That she was under the British flag, had British papers as a trading vessel, and a license from the British East India Company, and that her ostensible owners were British subjects, residing in London. It further appeared, that previously to the late war, and till, and at the
p. 80 time of the capture and condemnation in the British | court of admiralty hereinafter mentioned, the said ship was a duly registered American ship, and was owned by Isaac Clason, deceased, an American citizen, residing in New-York, or by the claimants, his executors, who were also American citizens, residing in New-York.

That soon after the commencement of the late war, the said ship sailed from the United States on a foreign voyage, and immediately after leaving a port of the United States on the said voyage, was captured by a British vessel of war, and carried into Halifax, Nova Scotia, where she was regularly libelled and condemned as prize in the court of vice-admiralty of that province; after which she was purchased by the British subjects who claimed to own her at the time she was re-captured by the Surprise. This last-mentioned capture having been made, the ship Star was brought into the port of New-York, and libelled in the district court of New-York as prize to the said privateer; upon which libel the appellants put in a claim, claiming the said ship as the property of their testator, and claiming to have the said ship restored to them upon the payment of salvage; which claim was rejected, and the ship was condemned. The cause was then carried to the circuit court, where the decree of the district court was affirmed. It was then brought, by appeal, to this court.

February 11*th.*

Mr. *Key*, for the appellants and claimants. The question in this cause arises under the prize act of the 26th of June, 1812, sec. 5. which,
p. 81 it is contended, | repeals the salvage act of 1800, as to this matter. The latter act provides, that condemnation in the enemy's prize courts shall be a bar to restitution on salvage to the original owner. The 5th section of the prize act of 1812, declares, 'that *all* vessels, goods, and effects, the property of any citizen of the United States, or of persons resident within, and under the jurisdiction of the United States, or of persons permanently resident within, and under the protection of any foreign prince, government, or state, in amity with the United States, which shall have been captured by the enemy, and which shall be recaptured by vessels commissioned as aforesaid, shall be restored to the lawful owners, upon payment by them respectively, of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court of competent jurisdiction, according

to the nature of each case, agreeably to the provisions heretofore established by law.' This section directs all vessels, goods, and effects, of citizens and neutrals, recaptured from the enemy, to be restored on payment of salvage, without reference to the fact, whether they had been previously condemned or not; and so far it modifies and repeals the salvage act of 1800. The original owner is, therefore, entitled to restitution, notwithstanding the British condemnation. Upon any other interpretation, the entire section would become wholly inoperative, as every case is included in the previous act of 1800. When that act passed, our law conformed to the English rule, which then prevailed. England subsequently altered her law, and our act | of 1812 copied the p. 82
British statute of the 43d George III.[1] That act must have been intended to make some change in the existing legislation on the subject; and it is probable that congress meant to make a distinction between recaptures by *public* ships and by *private* ships, unfavourable to the latter. The 'provisions heretofore established,' do not refer to *all* the provisions of the act of 1800; these words merely refer to the rate of salvage fixed by that act, and not to the principle of restitution. The latter is changed; the former remains unaltered.

Mr. *Winder*, and Mr. *Harper*, contra. The act of 1800 was not a prize act for privateers. The provision in the act of 1812 is merely incidental, and refers to the pre-existing law. Our policy of 1812 was not like that of England, which contemplates the extreme probability of the recapture of British vessels, even after condemnation by the enemy. Our object was to hold out the most liberal encouragement to cruizing. The British salvage acts merely refer to the recapture of British property; our act extends to *neutral*, as well as *American* property. The British statutes are merely an exception to the general rule, municipal and local. Our law is founded on the law of nations. The construction contended for might extend to enforce a demand of restitution after the lapse of an indefinite length of time, and after the intervention of repeated treaties of peace. | The act of 1800 is merely in affirmance of the law of nations, p. 83
which universally devests the title of the original owner after condemnation. The very term *recapture*, implies former ownership still subsisting; but it does not subsist here. How could the former owner be considered the 'lawful owner' after condemnation? 'The nature of each case' is to be determined by reference to the act of 1800, and imports something more than the mere rate of salvage. The contrary construction would make a distinction between public ships and privateers, unfavourable to the latter, contrary to the uniform policy of the country; and would create a confusion as to the recapture of the property of friends, which

[1] *Park on Insurance*, 94. 6th London ed. 2 *Marshall on Ins.* 501. *Horne's Compendium*, 34.

it cannot be supposed the legislature intended to introduce. The equitable rule of reciprocity would be prostrated; and neutral property must, in all cases, be restored, (*after* or *before* twenty-four hours possession by the enemy,) although the friendly power would not in the same case restore. Such a departure from the public law of the world is not to be lightly presumed; and statutes made *in pari materia* are to be construed together, and nothing is to be repealed by mere implication that may stand consistently with former enactments.

Mr. *Jones*, in reply. The claimants found their claim to restitution on payment of salvage, upon the 5th section of the act of the 26th of June, 1812. The captors resist the claim because the vessel was condemned before the recapture—and contend that the act of the 3d of March, 1800, is the law which is to determine the rights of the parties.
p. 84 This seems, | in fact, to be contending that a prior law repeals a subsequent one. If the act of 1812 is taken by itself, there can be no doubt but there must be restitution. But the captors insist that the words, 'according to the nature of the case agreeably to the provisions heretofore established by law,' which are found in the act of 1812, refer to the act of 1800, so as to determine by that law when restitution is, or is not to be made. Yet it seems obvious that these words refer to that law only for the measure and rule of salvage. According to the law of 1812, property of a citizen of the United States, re-captured from the enemy, is liable to be restored, but it is to be restored upon the payment of salvage, agreeably to the nature of the case: And to determine the nature of the case, and for no other purpose, we are referred to the pre-existing laws. If the act of 1812 is to be construed as the captors would construe it, then this fifth section is an absolute nullity. For if the law of 1800 is to be resorted to in order to determine, as well when restitution is to be made, as the salvage to be paid, there is no case in which the law of 1812 can have any operation. By the marine law of England, as it stood previously to any statute regulation on the subject, there could be no restitution after condemnation. Our law of 1800 adopted this principle. But by the English law, restitution is now to be made in all cases on the payment of salvage. The act of 1812 was doubtless intended to be in conformity to this just modification of the English law, of which it is almost a literal copy. There was good reason for this modification of the marine law in respect to our privateers.
p. 85 The enemy had their courts of vice-admiralty | at our very doors; our vessels would be captured one day and condemned the next. The legislature did not intend that the American owner should be deprived of his right of restitution by a condemnation, when there would be no more merit in recapturing a vessel that had been condemned than one that was not. There might have been reason for distinguishing between

captures by our public and by private armed vessels. It was to be supposed that our privateers would be cruising about the ports of the enemy in our neighbourhood, and would be likely to recapture American property recently captured and recently condemned. The employment of our men of war, it might have been contemplated, would be more distant and difficult. Why should the condemnation have any effect as to the right of restitution, when the property is recaptured from the hands of an enemy ? The law, as to restitution on salvage, would have no operation, if the property after condemnation came to the hands of a citizen or a neutral, because then there could be no recapture. To let the title to restitution depend on the condemnation, is to let the right of the citizen depend on the act of the enemy.

February 16th

Mr. Justice STORY delivered the opinion of the court. This is the case of an American ship, captured by the enemy during the late war, and after condemnation and sale to an enemy merchant, recaptured by the American private armed ship Surprise. And the question is, whether, under these circumstances, | the ship is to be restored on salvage to the p. 86
former American owner, or condemned as good prize of war. If the case were to stand on the general salvage act of 1800, in cases of recapture, (act of 3d of March, 1800, ch. 14.) it is perfectly clear that the claimants are barred of all right ; for that act expressly excepts from its operation, all cases where the property has been condemned by competent authority. The same result would flow from the principles of the law of nations. It is admitted, on all sides, by public jurists, that in cases of capture a firm possession changes the title to the property ; and although there has been in former times much vexed discussion as to the time at which this change of property takes place, whether on the capture or on the *pernoctation*, or on the carrying *infra præsidia*, of the prize ; it is universally allowed, that at all events, a sentence of condemnation completely extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign. It would follow, of course, that property recaptured from an enemy after condemnation would, by the law of nations, be lawful prize of war, in whomsoever the antecedent title might have vested.

It is supposed, however, that the provisions of the salvage act of 1800, ch. 14, are materially changed, in cases of captures by private armed ships, by the fifth section of the prize act of the 26th of June, 1812, ch. 107. That section declares, 'that all vessels, goods, and effects, the property of any citizen of the United States, or of persons resident within and under the protection of the United States, or of persons | permanently resident within, and under the protection of any p. 87

foreign prince, government, or state, in amity with the United States, which shall have been captured by the enemy, and which shall be recaptured by vessels commissioned as aforesaid, shall be restored to the *lawful owners* upon payment by them respectively of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court of competent jurisdiction, according to the nature of each case, *agreeably to the provisions heretofore established by law.*' The argument is, that as the section directs *all* vessels, goods, and effects of citizens and neutrals recaptured from the enemy to be restored, without any reference to the fact, whether they had been previously condemned or not, it so far qualifies and repeals the salvage act of 1800; and that consistently with this construction, the words 'agreeably to the provisions heretofore established by law,' may and ought to be referred to the rate of salvage fixed by the act of 1800, and not to the provisions of that act generally. In support of this argument, it has been urged, that upon any other construction the whole section becomes completely inoperative, as every case is embraced in the previous law. That congress may well be presumed to have intended to make a discrimination between cases of recapture by public and private ships of war, unfavourable to the latter; and that congress may have had in view a conformity to the British prize code, which since the passing of the act of 1800 had been changed in the manner now contended for by the claimant. |

p. 88 The argument asserted from the British prize code, certainly, cannot be supported upon the notion of any supposed recent change in the law relative to recaptures. So early as the reign of George II. the *jus postliminii* was, by statute, reserved to British subjects upon all recaptures of their vessels and goods, by British ships, even though a previous condemnation had passed upon them, with the exception of cases where such vessels, after capture, had been set forth as ships of war. The statute of 43 Geo. III. ch. 160. s. 39. has no farther altered the previous laws, than to fix the salvage at uniform stipulated rates, instead of leaving it to depend upon the length of time the recaptured ship was in the hands of the enemy. And the terms of this statute, are very different from the language of the fifth section of our prize act of 1812, and expressly exclude from its operation and benefits all neutral property.

In respect to the legislative intention, it is extremely difficult to draw any conclusion unfavourable to private armed ships from the language or policy of the prize act, or any subsequent act of congress passed during the war. The bounties held out to these vessels, not only by the prize act, but by other auxiliary acts, manifest a strong solicitude in the government to encourage this species of force. But we are not at liberty to entertain any discussions in relation to the policy of the

government, except so far as that policy is brought judicially to our notice in the positive enactments, and declared will of the legislature. We must interpret, therefore, this clause of the prize act by the general rules of construction applicable to | all statutes; and in this view we are of opinion p. 89
that the doctrine contended for by the claimant ought not to prevail.

In the first place, the section in question contains no repealing clause of any of the provisions of the salvage act of 1800, and therefore the whole laws on this subject are to be construed together, and unless so far as there is any repugnancy between them, are to be considered as in full force. That the section is free from all doubt in its language need not be asserted; but that every portion of it may, by fair rules of interpretation, be deemed merely affirmative of the existing law, is with great confidence maintained. There is no repugnancy which requires or even affords a presumption of legislative intent to repeal any portion of the salvage act. It is true that the section declares that *all vessels, goods, and effects* recaptured shall be restored; but to whom are they to be restored? Certainly, by the very terms of the act, to the 'lawful owners,' which to prevent the most injurious, and we had almost said absurd, consequences, must mean the 'lawful owners' at the time of the recapture. But the lawful owners of recaptured property, which has been, already, lawfully condemned, is not the original proprietor, but the person who has succeeded to that title under the decree of condemnation. Suppose the property at the time of the capture had belonged to one neutral, and after condemnation had been sold to another neutral, and then captured and recaptured by the enemy, can there be a doubt that the latter is, to all intents and purposes, the true and lawful owner, and that he may assert his | title against the first proprietor? Besides, p. 90
recapture by force of the term would seem most properly applied to cases where an inchoate title only was vested by capture. Can it be said in strict propriety of language, that property captured from an enemy, which at the time is the lawful property of an enemy purchaser, is recaptured from his hands? The recapture is always supposed to be from those who are the original captors, not from persons who have, by operation of law, succeeded to the title acquired under a decree of condemnation.

The section, however, does not stop here; nor is it necessary to rest its construction upon the import of a few detached terms. It proceeds to declare that the recaptured property shall be restored to the lawful owners upon payment of a reasonable salvage, 'according to the nature of each case, agreeably to the provisions heretofore established by law.' Here is a direct and palpable reference to the salvage act, not for the purpose of repeal, but for the purpose of recognizing it as in full force in respect to all cases of recapture. It is argued that the reference is

confined to the mere rates of salvage established by that act. Let us see whether, consistently with any supposed legislative intention, or any reasonable principle, such a construction can be sustained.

In the first place, it would make a discrimination between recaptures
p. 91 of property belonging | to the United States, and property belonging to neutrals and citizens, wholly unaccountable upon any principles of national policy. In case of a previous condemnation, the property, if belonging to citizens or neutrals, would be restored on salvage ; if belonging to the United States, it would be wholly condemned as good prize of war. In the next place, the property of neutrals and citizens, if recaptured by public ships, would be good prize ; but if recaptured by private armed ships, would be restored on salvage. Yet in respect to neutrals or citizens, if the intention was to confer a benefit on them, the reason would seem equally to apply to both cases. And if there was a policy in discouraging captures by privateers, and encouraging captures by public ships, it is strange that the legislature should not, in relation to captures not within the purview of this clause, have made a similar discrimination. The reason would be the same, and yet in those cases the salvage act uniformly gives a higher rate of salvage to private armed ships than to public ships ; and the prize acts superadd an exclusive bounty on prisoners of war captured by private armed ships, of no inconsiderable value. And whatever might be the case in relation to our own citizens, it is somewhat singular that the legislature should be paying bounties out of the treasury to encourage privateers, when they were in favour of neutrals, having no legal title, taking from them a large proportion of the lawful proceeds of prize.

There is yet another case which affords a more striking illustration of the difficulties which surround this construction. The salvage act of 1800 declares, that upon the recapture of neutral property the rule of reciprocity shall prevail. If the neutral would in the like case restore on salvage, then the American courts are to restore on the same salvage :
p. 92 if otherwise, then they are to condemn. If, therefore, by | the prize act of 1812, restitution is to be made in all cases of recapture of neutral property, and yet in the like cases the neutral sovereign would not restore, it would follow that the restitution would be without payment of any salvage, which would be repugnant not only to the intent, but to the words both of the salvage act and the prize act in any mode of interpretation. In a recent case in this court, (The Adeline, 9 Cranch. 244.) condemnation passed upon some French property which, during the late war, had been captured by the enemy, and recaptured by an American privateer, upon the ground that the rule of reciprocity established by the salvage act of 1800, applied to the case ; and as France would deny restitution, our courts were bound to apply the same principle to her.

There does not, therefore, seem any solid reason on which to rest the construction contended for by the claimant. And there are the most weighty reasons, founded upon public inconveniency, upon national law, and upon the very terms of the salvage and prize acts, for the contrary construction. In considering the section in question as merely affirmative, every difficulty vanishes, and the symmetry of a system apparently built up with great care and caution, as well as in strict accordance with the received principles of public law, is maintained and enforced.

But it has been asked if the section is merely affirmative, what reason can be assigned for its enactment? If no satisfactory answer could be assigned, it would not impair the force of the preceding reasoning. It is very common for the legislature to make laws in affirmance both of the common and statute law. This very act gives the district p. 93
courts cognizance of captures, and yet it was clearly settled that the courts already possessed the same jurisdiction. Doubts may and often do arise how far a provision already in existence may be applied to cases contemplated in new statutes. To obviate such doubts, whether real or imaginary, is certainly not an irrational or unsatisfactory mode of legislation, and often prevents serious mischiefs during the fluctuations of professional opinions, prior to a legal adjudication. It was probably to obviate some doubt of this sort that the clause in question was inserted in the act. Nor is it difficult to perceive some room for subtle doubt from the generality of the preceding (s. 4) section. That section declares that '*all captures and prizes* of vessels and property shall be forfeited,' and accrue to the owners, officers, and crew of the capturing private armed ship; and from the generality of this language it might possibly (we do not say upon any sound interpretation) have been doubted whether the words 'all captures' might not be held to comprehend captures of neutral property, which had not yet been condemned. At all events upon every view of this case the court are of opinion that the property having been previously condemned and title passed to the enemy, and, consistently with the salvage and prize acts, must be decreed to be good prize of war.

Decree affirmed, with costs.[1]

[1] Vide 2 Wheaton. Appendix, note I. pp. 40–49. As by the salvage act of the 3d of March, 1800, ch. 168. the rule | of reciprocity, (or, as Sir William Scott calls it, p. 94
amicable retaliation,) is the rule to be applied to cases of recaptures of the property of friendly nations, it may be useful to state the provisions contained in the different maritime codes on this subject, or which have been substituted in their place by treaty.

The present British law of salvage is established by the act of the 43d Geo. III. ch. 160., the 39th section of which provides that, 'If any ship, or vessel, taken as prize, or any goods therein, shall appear, in the court of admiralty, to have belonged to any of his majesty's subjects, which were before taken by any of his majesty's enemies, and at any time afterwards re-taken by any of his majesty's ships, or any

Olivera v. The Union Insurance Company.

(3 Wheaton, 183) 1818.

A vessel within a port, blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within that clause of the policy insuring against the 'arrests, restraints, and detainments of kings,' &c. for which the insurers are liable; and if the vessel so prevented be a neutral, having on board a neutral cargo, laden before the institution of the blockade, the restraint is unlawful.

A blockade does not, according to modern usage, extend to a neutral vessel found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted.

p. 184 A technical total loss must continue to the time of abandonment. | *Quære*, as to the application of this principle to a case where the loss was by a restraint on a blockade, and proof made of the commencement of the blockade, but no proof that it continued to the time of the abandonment?

ERROR to the circuit court for the district of Maryland.

On the 29th day of December, in the year 1812, the plaintiffs, who are Spanish subjects, caused insurance to be made on the cargo of the brig called the St. Francis de Assise, 'at and from Baltimore to the Havanna.' Beside the other perils insured against in the policy, according to the usual formula, were 'all *unlawful* arrests, restraints, and detainments of all kings,' &c. The cargo and brig were Spanish property, and were regularly documented as such. The vessel sailed from Baltimore,

privateer, or other ship, or vessel, under his majesty's protection; such ships, vessels, and goods, shall, in all cases, (save as hereafter excepted,) be adjudged to be restored, and shall be accordingly restored, to such former owner, or owners, he or they paying for salvage, if re-taken by any of his majesty's ships, one eighth part of the true value thereof, to the flag officers, captains, &c. to be divided, &c. And if retaken by any privateer, or other ship, or vessel, one sixth part of the true value of such ships and goods to be paid to the owners, officers, and seamen of such privateer, or other vessel, without any deduction. And if retaken by the joint operation of one or more of his majesty's ships, and one or more private ships of war, the judge of the court of admiralty, or other court having cognizance thereof, shall order such salvage, and in such proportions, to be paid to the captors, by the owners, as he shall, under the circumstances of the case, deem fit and reasonable. But, if such recaptured ship, or vessel, shall appear to have been set forth by the enemy as a ship or vessel of war, the said ship or vessel shall not be restored to the former owners; but shall, in all cases, whether re-taken by any of his majesty's ships, or by any privateer, be adjudged lawful prize, for the benefit of the captors.

This rule, with respect to the property of British subjects, is applied to recaptures
p. 95 of the property of nations in amity with Great Britain, until | it appears that they act towards British property on a less liberal principle; in such case it adopts their rule, and restores, at the same rate of salvage, or condemns, under the same circumstances in which their own law and practice restores or condemns. The Santa Cruz, 1 *Rob.* 5. 63.

By the most recent French law, if a French vessel be re-taken from the enemy, after being in his hands more than twenty-four hours, if recaptured by a privateer, she is good prize to the re-captor; but if re-taken before twenty-four hours have elapsed, she is restored to the owner, with the cargo, upon the payment of one third the value for salvage, in case of recapture by a privateer, and one thirtieth

and was detained by ice till about the 8th day of February, in the year 1813, when, being near the mouth of the Chesapeake bay, the master

in case of a recapture by a public ship. But in case of recapture by a public ship, after twenty-four hours possession, she is restored on a salvage of one tenth.* |

Although the letter of the ordinances previous to the revolution, condemns as good prize, French property recaptured after being twenty-four hours in possession of the enemy, whether the same be retaken by public or private armed vessels; yet it seems to have been the constant practice in France to restore such property when recaptured by the king's ships. *Valin sur l'Ord. Liv. 3. tit. 9. Des Prises, art. 3. Traité des Prises. ch. 6. sect. 1. n. 8. s. 88. Pothier. De Propriété. n. 97. Emerigon, Des Assurances, tom. 1. p. 497.* The reservation contained in the above ordinance of 1779, made the salvage discretionary in every case, it being regulated by the king in council according to the particular circumstances. *Emerigon. Ib.* p. 96

France applies her own rule to recaptures of the property of friendly nations. *Pothier, De Propriété, n. 100. Emerigon, Des Assurances, tom. 1. p. 499.* By the Réglement of the 2 Praireal, 11th year, art. 54. this relaxation of the rule *as to captures by public ships*, is extended to allies *generally*, so as to grant them restitution after twenty-four hours possession by the enemy upon the payment of a salvage of one tenth; but restitution on recaptures by public ships has always been made to the subjects of *Spain* on account of the intimate relation subsisting between the two powers, whilst it is refused even to them in recaptures by privateers. *Azuni, Part 2, ch. 4. s. 11. Bonnemant's Translation of De Habreu, tom. 2. p. 83, 84.*

The French law, also, restores upon payment of salvage, even after twenty-four hours possession by the enemy, in cases where the enemy leave the prize a derelict, or it reverts to the original proprietor in consequence of the perils of the seas, without a military recapture. *Ordonnance de 1681, liv. 3. tit. 9. Des Prises, art. 9.* Vide 2 Wheaton, Appen. p. 47. |

Spain formerly adopted the law of France, having taken its prize code from that country, with which it had been so long connected by the closest ties; and in the p. 97

* 'Si aucun navire de nos sujets pris par nos ennemis, a été entre leur mains jusques à vingt-quatre heures, et après, qu'il soit recous et repris par aucuns de nos navires de guerre ou autres de nos sujets, la prise sera déclarée bonne: mais si ladite reprise est faite auparavant les vingt-quatre heures, il sera restitué avec tout ce qui étoit dedans, et en aura toutefois le navire de guerre qui l'aura recous et repris, le tiers.' *Ordonnance d'Henri* III. *en Mars*, 1584. *art.* 61. 'Si aucun navire de nos sujets est repris sur nos ennemis, après qu'il aura demeuré entre leur mains pendant vingt-quatre heures, il sera restitué au propriétaire, avec tout ce qui étoit dedans à la reserve du tiers qui sera donné au navire qui aura fait la recousse.' *Ordonnance de* 1681, *Liv. 3. tit. 9. des Prises, art. 8.* 'Les règlemens concernant la recousse continueront d'être observés suivant leur forme et teneur; en conséquence, lorsque les navires de ses sujets auront été repris par les corsaires armés en course contre les ennemis de l'état, après avoir été vingt-quatre heures en leur mains, ils leur appartiendront en totalité; mais dans le cas où la reprise aura été faite avant les vingt-quatre heures, le droit de recousse ne sera que du tiers de la valeur du navire recous et de sa cargaison. En ce qui concerne les reprises faites par les vaisseaux, frégates ou outres bâtimens de sa majesté, le tiers sera adjugé à son profit pour droit de recousse, si elle est faite dans les vingt-quatre heures; et après ledit délai, la reprise sera adjugée en totalité à sa majesté, sans que les états-majors des dits vaisseaux et frégates puissent y rien prétendre: se reservant sa majesté d'accorder aux équipages, une gratification proportionée à la valeur du bâtiment et de sa cargaison, d'après les connoisements et factures, comme aussi de donner aux états-majors des vaisseaux qui auront faites les reprises, et qui auroient eu soin de se distinguer par des actions de valeur, telles graces ou récompenses que sa majesté avisera bon être, suivant les circonstances.' *Ordonnance de 15 Juin, 1779.* 'Lorsque les bâtimens Français auront été repris par les vaisseaux de la republique, après avoir été 24 heures au pouvoir de l'ennemi, les bâtimens et leur cargaisons appartiendront en totalité aux équipages preneurs; mais dans le cas où la reprise aura été faite avant les vingt-quatre heures, le droit de recousse ne sera que du tiers de la valeur du navire repris et de sa cargaison.' *Loi d'Octobre*, 1793. By the réglement of the 2d of Praireal, year 11, art. 54. the rate of salvage on recaptures by *public ships*, before twenty-four hours possession, was fixed at one thirtieth.

of the brig discovered four frigates, which proved to be a British blockading squadron. He, however, endeavoured to proceed to sea. While making this attempt, he was boarded by one of the frigates, the commander of which demanded and received the papers belonging to the vessel, and endorsed on one of them the words following: 'I hereby certify that the bay of Chesapeake, and ports therein, are under a strict

case of the San Iago, (mentioned in the Santa Cruz, 1 *Rob.* 50.) it was applied by the lords of appeal upon the principle of reciprocity as the rule in British recaptures of Spanish property. But by the Spanish prize ordinance of the 20th of June, 1801, art. 38, it was modified as to the property of friends, it being provided that when it appears that recaptured ships of friends *are not laden for enemy's account*, they shall be restored, if recaptured by public vessels, for one eighth, if by privateers, for one sixth salvage: provided, that the nation to whom such property belongs, has adopted, or agrees to adopt, a similar conduct towards Spain. The ancient rule is preserved as to recaptures of Spanish property; it being restored without salvage if recaptured by a king's ship, before or after twenty-four hours possession; and if recaptured by a privateer within the twenty-four hours, upon payment of one half for salvage; if recaptured after that time it is condemned to the recaptors. The Spanish law has the same provisions with the French in cases of captured property becoming derelict, or reverting to the possession of the former owners by civil salvage.

Portugal had adopted the French and Spanish law in her ordinances of 1704, and of December, 1796. But, in May, 1797, after the Santa Cruz was taken, and before the judgment in that case, Portugal revoked her former rule that twenty-four hours possession devested the property, and allowed restitution, on salvage of one-eighth, if the recapture was by a public ship, and one-fifth if by a privateer. In the Santa Cruz and its fellow cases, Sir W. Scott distinguished between recaptures made *before* and *since* the ordinance of May, 1797; condemning the former where the property had been twenty-four hours in the enemy's possession, and restoring the latter upon payment of the salvage fixed by the Portuguese ordinances.

The ancient law of Holland regulated restitution on salvage at different rates,
p. 98 according to the length of time the property had been in the enemy's | possession. *Bynk. Q. J. Pub.* l. 1. *ch.* 5. But as between the United States and the Netherlands, this matter is regulated by the convention of 1782, the first article of which provides, that recaptured vessels of either nation, not having been twenty-four hours in possession of the enemy of either, shall be restored on payment of one-third salvage, if recaptured by a privateer. By the 2d article, if the vessel has been twenty-four hours in possession of the enemy, and is recaptured by a privateer, she shall be condemned to the re-captors. By the 3d article, if the recapture is made by a public ship, the property is to be restored on payment of a thirtieth part for salvage, in case it has been twenty-four hours in possession of the enemy; if longer, a tenth part.

The treaties between the United States and Prussia of 1785, and 1799, by which recaptures from a common enemy were regulated, have both expired.

The ancient law of Denmark condemned after twenty-four hours possession by the enemy, and restored, if the property had been a less time in his possession, upon payment of a moiety for salvage. But the ordinance of the 28th of March, 1810, restored Danish or allied property without regard to the length of time it might have been in the enemy's possession, upon payment of one-third for salvage.

By the ancient Swedish ordinances, and that of July, 1788, it is provided, that the rates of salvage on Swedish property shall be one half of the value, without regard to the length of time the property may have been in the enemy's possession. The treaty between the United States and Sweden of 1783, which has expired, contained precisely the same stipulations on this subject as that with the Netherlands.

Although our salvage act may not, perhaps, extend to cases of recapture from *pirates*, yet there can be little doubt that the benefit of the same equitable rule of reciprocity which is recognized by the statute, and is also a principle of public law, would be imparted to such cases. Thus Valin is of the opinion that the property of friendly nations, retaken from pirates by French captors, ought not to be restored
p. 99 to them upon payment of salvage, if the law of their | own country gives it wholly

and rigorous blockade, and you must return to Baltimore, and upon no account whatever attempt quitting or going out of the said port.' The brig returned; after which the master made his protest, and gave notice

to the retakers, otherwise there would be a defect of reciprocity, which would offend against that impartial justice which is due from one state to another.*

As a capture by pirates cannot devest the title of the original owner by any length of possession, however great, it is obvious that the former proprietor is entitled to restitution in case of recapture from them by friendly powers, upon the payment of a reasonable salvage. But certain nations have established a different rule, at least as respects the property of their own subjects, and give the whole property recaptured from pirates to the re-takers. Such was, or is, the usage of Holland, Spain, and some of the Italian States. *Grotius, De J. B. ac P. L.* 3. *ch.* 9. *s.* 17. *De Habreu, Part* 2, *ch.* 6.

But Grotius is of the opinion that such a municipal regulation cannot prevent foreigners from reclaiming their property, upon payment of a reasonable salvage, because by the universal law of nations the property of the original owner is not devested on a capture by pirates. *Ib.*

And by the 9th article of the treaty of 1795 between the United States and Spain, the latter has dispensed with her peculiar law in this respect, both parties having stipulated to restore the property of either nation recaptured from pirates.

In case of recapture from pirates, the French law restores the property of subjects and *allies*, (in which last term, neutrals are included,) on payment of one-third for salvage.†

A capture by a cruizer of the Barbary powers is not a | piratical seizure, which p. 100
will have the effect of invalidating the conversion of property under it. They were formerly considered as pirates, but have since acquired the rights of legation and of war in form. Consequently, recaptures from them are to be judged by the same rule as those from any other public enemies. The Helena, 4 *Rob.* 3. *Sir L. Jenkins's Works, Vol. II. p.* 791. *Bynk. Q. J. Pub. L.* 1. *ch.* 17. *Emerigon, Des Assurances, tom.* 1. *p.* 526.‡ But the law of nations, as received among the nations of Europe and the countries colonized by them, or that portion of the human race denominated *Christendom*, is not to be applied to them, to the Turks, and other Mohammedan people, with the same rigour and in all the details with which it is administered among that class of nations to which it is peculiarly applicable. The Helena, 4 *Rob.* 3. The Kinders Kinder, 2 *Rob.* 88. The Hurtige Hane, 3 *Rob.* 324. The Madonna del Burso. 4 *Rob.* 169. *Ward's History of the Law of Nations.* The same formalities in proceeding to condemn captured property, are not required in order to devest the title of the original owner. It is sufficient, if the confiscation takes place *in their way*, and according to the established custom of that part of the world. The Helena, 4 *Rob.* 3. But they are held to be bound to an observance of the law of *blockade*, that being one of the most universal and simple operations of war; and if a European army or fleet is blockading a town or port, they are not at liberty to trade with it. The Hurtige Hane, 3 *Rob.* 324. And, though, in prize causes, an indulgence is granted to the subjects of the Ottoman empire, which is not allowed to any foreigners of Christendom, in consideration of their peculiar situation and

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* 'Me feroit penser, que les alliés qui aux termes de notre article, ont droit de réclamer leur effets repris sur des pirates par des François, ne doivent s'entendre que de ceux qui suivent la même jurisprudence que nous; autrement, il n'y auroit pa de reciprocité: ce qui blesseroit l'egalité de justice, que les états se doivent les uns aux autres. *Sur l'Ord. L.* 3. *tit.* 9 *art.* 10. *Traité des Prises, ch.* 6. *s.* 2. *n.* 8.

† 'Les navires et effets de nos sujets ou alliés repris sur les pirates, et réclamés dans l'an et jour de la Déclaration qui en aura été faite en l'Amirauté, seront rendus aux propriétaires, en payant le tiers de la valeur du vaisseau, et des marchandises pour frais de recousse. *Ord. de* 1681. *L.* 3. *tit.* 9. *Des Prises, art.* 10.

‡ Depuis long-temps, les mœurs antiques étoient disparues des Bords Africains. Les Barbaresques étoient devenus de vrais pirates. *Bugia, ed algieri, infami, nidi di corsari*, dit le Tasse; Jérusalem délivrée, *chant.* 15, *st.* 21. Mais aujourdhui ils ne merite plus cette qualification, parce que dans leur guerre, ils se conforment à *l'ancien droit des gens.* Ce n'est que par représailles que leurs prisonniers deviennent esclaves parmi nous.' *Emerigon, loc. cit. Tom.* 1. *p.* 256.

to the agent of the owners in Baltimore, who abandoned 'in due and |
p. 185 reasonable time.' The underwriters refused to pay the loss on which this suit was brought. It appeared, also, on the trial, that the vessel had taken her cargo on board, and sailed on her voyage before the blockade was instituted. On this testimony the plaintiff's counsel requested the court to instruct the jury, that if they believed the matters so given to them in evidence, the plaintiffs were entitled to recover. The court refused to give this instruction, and the jury found a verdict for the defendants; the judgment on which was brought before this court, on a writ of error.

February 4th.

Mr. *Harper*, for the plaintiffs, argued, that a right of abandonment accrued on the original restraint or obstruction of the voyage by the blockade, without an actual attempt to pass. Upon reason and authority, the interposition of the blockade was a prevention of the prosecution of the voyage, and, consequently, a loss within the policy. To constitute a technical total loss, which would give a right to abandon, it was not necessary that the vessel should expose herself to a physical risk, or actual manucaption. It was sufficient that there was a moral impossibility of prosecuting the voyage. But here was an actual restraint by the *vis major* in endorsing the vessels papers, and ordering her back to Baltimore, which would unquestionably justify the abandonment. The restraint was 'unlawful,' according to the true intent of this qualification of the usual terms of the policy; because the blockade was instituted
p. 186 after the cargo was taken on board, and the vessel had a legal | right to proceed with it, notwithstanding the blockade.[1] The case of Barker v. Blakes [2] supports the doctrine that the insured may abandon upon a mere proclamation of blockade, although under the peculiar circumstances of that case the party was held to have delayed his abandonment too long. The decisions of our own courts concur to support this doctrine.[3]

p. 101 character, and of their not being professors of exactly the same law of nations | with ourselves; yet in matters of contract between such persons, or between them and other foreigners, courts of justice have not thought themselves at liberty to act otherwise, than by the general rules applicable to all forensic business. The Jerusalem, 2 *Gallis.* 191–201.

The case of the rescue of captured vessels and cargoes from the enemy, by the insurrection of the persons on board, is not provided for by our salvage act or the British statute. Nor is the case of rescue mentioned in the French and other continental ordinances. Restitution to the original owner, is, however, universally decreed in such cases, without regard to the length of time the recaptured property may have been in the enemy's possession; and the rate of salvage is discretionary, and dependant upon the value of the services performed. The Two Friends, 1 *Rob.* 271. The Walker, *Stewart*, 105. *Valin, Traité des Prises, ch.* 6, *s.* 1, *n.* 18. *Bonnemant's Translation of De Habreu, tom.* 2, *p.* 84. *Emerigon, Des Assurances, tom.* 1, *p.* 505.

[1] The Betsey, 1 *Rob.* 93. The Vrow Judith, *Id.* 150. The Potsdam, 4 *Rob.* 89.

[2] 2 *East*, 283. S. C. 2 *Marshall on Ins.* App. No. VIII. p. 835.

[3] Schmidt v. The United Ins. Co. 1 *Johns. Rep.* 249. Symonds v. The United Ins. Co. 4 *Dall.* 417.

Mr. *Jones* and Mr. *Winder*, contra, contended, that the decisions of this court laid the true foundation for the determination of the present case. The loss did not fall within the peculiar clause of the policy as to '*unlawful* arrests, restraints, and detainments.' The case of M'Call *et al.* v. The Marine Insurance Company, determines that the qualification 'unlawful,' extends to all the perils mentioned, to arrests, and restraints, and detainments; and that a blockade is not an unlawful restraint.[1] Whether egress in the present case was unlawful or not, is immaterial, unless the vessel had been actually detained and carried in for adjudication. The manner in which the blockade is to be enforced, is of military discretion, and a neutral vessel, with a cargo taken on board after the commencement of the blockade, may be turned back, though she may not be liable to condemnation as prize. Had the vessel been sent in | for adjudication, the captors would have been excused from costs and p. 187 damages, though she might have been acquitted, and pursued her voyage. Consequently, the restraint was not unlawful. This is a claim for indemnity on account of a technical total loss, consequential on some of the perils insured against; a loss breaking up the voyage, or rendering it not worth pursuing. But there is no proof on the record that the blockade still continued at the time of the abandonment. Besides, the voyage must be completely and entirely broken up. The authorities have settled it that mere apprehension is no ground of abandonment; no loss, *quia timet*, is known to the law. In Barker v. Blakes, the two circumstances of capture and the supervening blockade were combined and connected together to render the voyage not worth pursuing, and to justify the abandonment. The elementary writers have collected the cases concurring to establish the doctrine that a blockade, or embargo, or any other inhibition of trade will not authorize an abandonment.[1]

Mr. *Harper*, in reply. The case of M'Call *et al.* v. the Marine Insurance Company, went on the ground that the blockade was *lawful*, and, therefore, the insured was held not entitled to recover. But in this case, it is contended that the blockade was *unlawfully* applied to a neutral vessel attempting to depart with a cargo taken on board before the commencement of the blockade. The right of the neutral | to depart is incon- p. 188 sistent with the pretended right of the belligerant to prevent his egress. The supposed exemption from costs and damages on the part of the blockading squadron would not show that the neutral had no right to proceed, but only that his right was not so manifest and apparent as to subject the captors to costs and damages. It was unnecessary for the insured to prove that the blockade continued after the vessel was turned back. The legal presumption is, that it still continued; and it is a public, notorious, historical fact, that it did continue. In Barker v. Blakes,

[1] 8 *Cranch* 59. [1] 1 *Marshall on Ins.* 219. *Park on Ins.* 223. *6th ed.*

the court of K. B. merely state the previous detention by the capture, in order to show that the party was not in fault, in not reaching Havre before the blockade commenced. But the main stress of the opinion tends to show that the institution of a blockade may afford a ground of abandonment, without an actual attempt to enter the blockaded port. The cases cited by Marshall and Park, are not cases of *blockade*, but of municipal edicts interdicting trade with the ports of the sovereign by whom they were established.

February 19th.

Mr. Chief Justice MARSHALL delivered the opinion of the court, and after stating the facts, proceeded as follows:

On the part of the plaintiff in error, it has been contended, that the assured have sustained a technical total loss, by a peril within that clause in the policy, which insures 'against all unlawful arrests, restraints, and detainments of kings,' &c. |

p. 189 He contends, 1st. That a blockade is 'a restraint' of a foreign power. 2d. That, on a neutral vessel, with a neutral cargo, laden before the institution of the blockade, it is 'an *unlawful* restraint.'

The question, whether a blockade is a peril insured against, is one on which the court has entertained great doubts. In considering it, the import of the several words used in the clause has been examined. It certainly is not 'an arrest,' nor is it 'a detainment.' Each of these terms implies possession of the thing by the power which arrests or detains; and, in the case of a blockade, the vessel remains in the possession of the master. But the court does not understand the clause as requiring a concurrence of the three terms, in order to constitute the peril described. They are to be taken severally; and, if a blockade be a 'restraint,' the insured are protected against it, although it be neither an 'arrest' nor 'detainment.'

What, then, according to common understanding, is the meaning of the term 'restraint?' Does it imply, that the limitation, restriction, or confinement, must be imposed by those who are in possession of the person or thing which is limited, restricted, or confined; or is the term satisfied by a restriction, created by the application of external force? If, for example, a town be besieged, and the inhabitants confined within its walls by the besieging army, if in attempting to come out, they are forced back, would it be inaccurate to say that they are *restrained* within those limits? The court believes it would not; and, if it would not,

p. 190 then with equal propriety may it be | said, when a port is blockaded, that the vessels within are confined, or restrained from coming out. The blockading force is not in possession of the vessels inclosed in the harbour, but it acts upon and restrains them. It is a *vis major*, applied directly

and effectually to them, which prevents them from coming out of port. This appears to the court to be, in correct language, 'a restraint' of the power imposing the blockade, and when a vessel, attempting to come out, is boarded and turned back, this restraining force is practically applied to such vessel.

Although the word, as usually understood, would seem to comprehend the case, yet this meaning cannot be sustained, if, in policies, it has uniformly received a different construction. The form of this contract has been long settled; and the parties enter into it without a particular consideration of its terms. Consequently, no received construction of those terms ought to be varied.

It is, however, remarkable, that the industrious researches of the bar have not produced a single case, from the English books, in which this question has been clearly decided. In the case of Barker v. Blakes, which has been cited and relied on at the bar, one of the points made by the counsel for the underwriters was, that the abandonment was not made in time, and the court was of that opinion. Although, in this case, it may fairly be implied, from what was said by the judge, that a mere blockade is not a peril within the policy, still this does not appear to have been considered, either at the bar or by the bench, as the direct question in the cause, nor was it expressly decided. The opinion | of p. 191
the court was, that the blockade constituted a total loss, which was occasioned by the detention of the vessel; but that the abandonment was not made within reasonable time after notice of that total loss. In forming this opinion, it had not become necessary to inquire whether the blockade, unconnected with the detention, was, in itself, a peril against which the policy provided. The judgment of the court could not be, in the most remote degree, influenced by the result of this inquiry; and, consequently, it was not made with that exactness of investigation which would probably have been employed, had the case depended on it. It is also to be observed, that the vessel did not attempt to proceed towards the blockaded port, but lay in Bristol when the abandonment was made. The blockading squadron, therefore, did not act directly on the vessel, nor apply to her any physical force. It is not certain, that such a circumstance might not have materially affected the case. This court, therefore, does not consider the question as positively decided, in Barker v. Blakes.

The decisions of our own country would be greatly respected, were they uniform; but they are in contradiction to each other. In New-York, it has been held, that a blockade *is*, and in Massachusetts, that *it is not*, a peril within the policy. The opinions of the judges of both these courts are, on every account, entitled to the highest consideration. But they oppose each other, and are not given in cases precisely similar

to that now before this court. The opinion that a blockade was not a restraint, was held by the courts of Massachusetts ; but was expressed
p. 192 by the | very eminent judge who then presided in that court, in a case where the vessel was not confined within a blockaded port by the direct and immediate application of physical force to the vessel herself.

Believing this case not to have been expressly decided, the court has inquired how far it ought to be influenced by its analogy to principles which have been settled.

It has been determined in England that if the port for which a vessel sails be shut against her by the government of the place, it is not a peril within the policy. In Hadkinson v. Robinson, a vessel bound to Naples was carried into a neighbouring port by the master in consequence of information received at sea that the port of Naples was shut against English vessels. In an action against the underwriters the jury found a verdict for the defendants, and, on a motion for a new trial, the court said ' a loss of the voyage to warrant the insured to abandon must be occasioned by a peril acting upon the subject matter of the insurance immediately, and not circuitously, as in the present case. The detention of the ship at a neutral port, to avoid the danger of entering the port of destination cannot create a total loss within the policy, because it does not arise from any peril insured against.'[1]

It will not be denied that this case applies in principle to the case of a vessel whose voyage is broken up by the act of the master on hearing that his port of destination is blockaded. The peril acts directly on the vessel not more in the one case than in the other. But if, in attempting
p. 193 to pass the blockading | squadron, the vessel be stopped and turned back, the force is directly applied to her, and does act directly and not circuitously.

Without contesting or admitting the reasonableness of the opinion, that the loss of the voyage occasioned by the detention of the ship by her master in a neutral port is not within the policy, it may well be denied to follow as a corollary from it, that a vessel confined in port by a blockading squadron, and actually prevented by that squadron from coming out, does not sustain the loss of her voyage from the restraint of a foreign power, which is a peril insured against.

Lubbock v. Rowcroft, which was decided at *nisi prius*, is in principle no more than the case of Hadkinson v. Robinson. Having heard that his port of destination was blockaded by or in possession of the enemy, the master stopped in a different port, and the insured abandoned. The loss was declared to be produced by a peril not within the policy. It is unnecessary to repeat the observations which were made on the case of Hadkinson v. Robinson.

[1] 3 *Bos. & Pul.* 388.

An embargo is admitted to be a peril within the policy. But, as has been already observed, the sovereign imposing the embargo is virtually in possession of the vessel, and may, therefore, be said to arrest and detain her. Yet, in fact, the vessel remains in the actual possession of the master or owner, and has the physical power to sail out and proceed on her voyage. The application of force is not more direct on a vessel stopped in port by an embargo, than on a vessel stopped in port by a blockading squadron. The danger of attempting to violate a blockade is as | great as the danger of attempting to violate an embargo. The p. 194
voyage is as completely broken up in one case, as in the other, and in both the loss is produced by the act of a sovereign power. There is as much reason for insuring against the one peril as against the other; and if the word restraint does not necessarily imply possession of the thing by the restraining power, it must be construed to comprehend the forcible confinement of a vessel in port, and the forcible prevention of her proceeding on her voyage. If so, the blockade is in such a case a peril within the policy.

The next point to be decided is the unlawfulness of this restraint.

That a belligerent may lawfully blockade the port of his enemy is admitted. But it is also admitted, that this blockade does not, according to modern usage, extend to a neutral vessel, found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted. If, then, such a vessel be restrained from proceeding on her voyage by the blockading squadron, the restraint is unlawful. The St. Francis de Assise was so restrained, and her case is within the policy.

It has been contended that it was the duty of the neutral master to show to the visiting officer of the belligerent squadron his right of egress, by showing not only the neutral character of his vessel and cargo, but that his cargo was taken on board before the institution of the blockade.

This is admitted; and it is believed that the bill of exceptions shows satisfactorily that these facts were proved to the visiting officer. It is stated that the | vessel and cargo were regularly documented; that the p. 195
papers were shown, and that the cargo was put on board, and the vessel had actually sailed on her voyage, before the institution of the blockade.

There is, however, a material fact which is not stated in the bill of exceptions with perfect clearness. The loss, in this case, is technical, and the court has decided that such loss must continue to the time of abandonment.[1] It is not necessary that it should be known to exist at the time of abandonment, for that is impossible; but that it should actually exist; a fact which admits of affirmative or negative proof at

[1] See Rhinelander v. The Ins. Com. of Pennsylvania, 4 *Cranch*, 29. Marshall v. Delaware Ins. Com. *Id.* 202. Alexander v. The Baltimore Ins. Com. *Id.* 370.

the trial of the cause. Upon the application of this principle to this case, much diversity of opinion has prevailed. One judge is of opinion that the rule, having been laid down in a case of capture, is inapplicable to a loss sustained by a blockade. Two judges are of opinion that proof of the existence of the blockade having been made by the plaintiff, his case is complete; and that the proof that it was raised before the abandonment ought to come from the other side. A fourth judge is of opinion, that connecting with the principle last mentioned, the fact stated in the bill of exceptions that the abandonment was 'in due and reasonable time,' it must be taken to have been made during the existence of the technical loss. Four judges, therefore, concur in the opinion that the plaintiffs are entitled to recover; but as they form this opinion on different principles, nothing but the case itself is decided: That is, that a vessel
p. 196 within a port | blockaded after the commencement of her voyage, and prevented from proceeding on it, sustains a loss by a peril within the policy; and if the vessel, so prevented, be a neutral, having on board a neutral cargo received before the institution of the blockade, the restraint is unlawful.

Judgment reversed.[1]

[1] On the question of blockade three things must be proved: 1st, the existence of an actual blockade; 2dly. The knowledge of the party; and, 3dly, some act of violation, either by going in, or by coming out with a cargo laden after the commencement of blockade. The Betsey, 1 *Rob.* 93.

The government and courts of the United States have constantly maintained, 'that ports not actually blockaded by a present, adequate, stationary force, employed by the power which attacks them, shall not be considered as shut to neutral trade in articles not contraband of war; that, though it is usual for a belligerent to give notice to neutral nations, when he intends to institute a blockade, it is possible that he may not act upon his intention at all, or that he may execute it insufficiently, or that he may discontinue his blockade, of which it is not customary to give any notice: that consequently, the presence of the blockading force is the natural criterion by which the neutral is enabled to ascertain the existence of the blockade at any given period, in like manner as the actual investment of a besieged place is the evidence by which we decide whether the siege, which may be commenced, raised, recommenced, and raised again, is continued or not; that of course a mere notification to a neutral minister, shall not be relied upon, as affecting with knowledge of the actual existence of the blockade, either his government or its citizens; that a vessel cleared or bound to a blockaded port, shall not be considered as violating in any manner, the blockade, unless, on her approach towards such port, she shall have been previously warned not to enter it; that this view of the law, in
p. 197 itself | perfectly correct, is peculiarly important to nations, situated at a great distance from the belligerent parties, and, therefore, incapable of obtaining other than tardy information of the actual state of their ports; that whole coasts and countries shall not be declared (for they can never be more than *declared*) to be in a state of blockade, and thus the right of blockade converted into the means of extinguishing the trade of neutral nations; and lastly, that every blockade shall be impartial in its operation, or, in other words, shall not open and shut for the convenience of the party that institutes it, and at the same time repel the commerce of the rest of the world, so as to become the odious instrument of an unjust monopoly, instead of a measure of honourable war.' For the conduct of the government in this respect, see the documents in the *Appendix* to 3 Wheaton, NOTE I. The decisions of the courts, are collected in Mr. Condy's edition of Marshall on Insurance, vol. I. p. 81. note (3.) To the cases there cited, add the following: Williams v. Smith, 2 *Caines' Rep.* 1. Radcliff v. The United Insurance Company, 7 *Johns. Rep.* 38.

The Fortuna.—Krause et al. claimants.

(3 Wheaton, 236) 1818.

A question of proprietary interest and concealment of papers. Farther proof ordered, open to both parties. On the production of farther proof by the claimant, condemnation pronounced. |

Where a neutral ship owner lends his name to cover a fraud with regard to the *cargo*, this circumstance will subject the *ship* to condemnation. p. 237

It is a relaxation of the rules of the prize court to allow time for farther proof in a case where there has been concealment of material papers.

THIS is the same cause which is reported in 2 Wheaton, 161, and which was ordered to farther proof at the last term. It was submitted without argument, upon the farther proof, at the present term.

In the case of Fitzsimmons v. The Newport Insurance Company, (4 *Cranch*, 185. 198.) it was laid down by this court, that the 18th article of the treaty of 1794, between the United States and Great Britain, seems to be a correct exposition of the law of nations, and is admitted by the parties to the treaty, as between themselves, to be a correct exposition of the law, or to constitute a rule in that place of it. 'Neither the law of nations, nor the treaty, admits of the condemnation of a neutral vessel for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases, construed into an attempt to enter that port, and has, therefore, been adjudged a breach of the blockade from the departure of the vessel. Without giving any opinion on that point, it may be observed, that in such cases, the fact of sailing is coupled with the *intention*, and the sentence of condemnation is founded on an actual breach of blockade.' | 'It is impossible to read that instrument, (the treaty) p. 198 without perceiving a clear intention in the parties to it, that after notice of the blockade, an attempt to enter the port must be made, in order to subject the vessel to confiscation. By the language of the treaty it would appear, that a second attempt to enter the port must be made, in order to subject the vessel to confiscation.' 'It is agreed,' says that instrument, 'that every vessel so circumstanced' (that is, every vessel sailing for the blockaded port, without knowledge of the blockade) 'may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall again attempt to enter.'

As to violating a blockade by coming out with a cargo, the time of shipment is very material, for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port. The Betsey, 1 *Rob.* 93. The Frederick Molke, *Id.* 72. The Neptunus, *Id.* 170. A neutral ship departing can only take away a cargo *bona fide* purchased and delivered before the commencement of the blockade: if she afterwards take on board a cargo, it is a violation of the blockade. The Vrouw Judith, *Id.* 1 *Rob.* 150. The Rolla, 6 *Rob.* 364. Where a ship was transferred from one neutral merchant to another in a blockaded port, and sailed out in ballast, she was determined not to have violated the blockade. The Potsdam, 4 *Rob.* 89. The Juffrow Maria Schroeder, *Ib.* note, (*a*). But a ship which had been purchased by a neutral of the enemy in a blockaded port, and sailed from thence on a voyage to the neutral country, was held liable to condemnation. The General Hamilton, 6 *Rob.* 61. And where the vessel was captured on a voyage to the blockaded port, in ballast, she having sailed for the purpose of bringing away goods which had become the property of neutral merchants before the date of the blockade, she was held liable to condemnation. The rule of | blockade permits an *egress* to ships inno- p. 199 cently in the port before the restriction was imposed, and even with cargoes, if previously laden; but in the case of *ingress*, there is not the same reason for indulgence; there can be no surprise upon the parties, and, therefore, nothing short of a physical necessity is admitted as an adequate excuse for making the attempt of

February 26th.

Mr. Justice JOHNSON delivered the opinion of the court. Both vessel and cargo, in this case, are claimed in behalf of M. & J. Krause, Russian merchants, resident at Riga. The documents and evidence exhibit Martin Krause as the proprietor of the ship, but the captain swears that he considered her as the property of the house of M. & J. Krause, from their having exercised the ordinary acts of ownership over her; and in this belief he is supported by the fact that his contract is made with John Krause, by whom he appears to have been put in command of the
p. 238 ship.[1] Martin Krause, | who appears in the grand bill of sale, is the same Martin Krause who is a member of the firm of M. & J. Krause.

In all its prominent features, this case bears a striking resemblance to the case of the St. Nicholas. A vessel documented as Russian is placed under the absolute control of a British house, is despatched under the orders of that house to the Havanna, where she is loaded under the directions of an individual of the name of Muhlenbruck, who assumes the character of agent of the Russian owners; she is then ostensibly cleared out for Riga, but with express orders to call at a British port,

entry. The Comet, *Edwards*, 32. A maritime blockade is not violated by sending goods to the blockaded port, or by bringing them from the same, through the interior canal navigation of the country. A mere maritime blockade, effected by a force operating only at sea, can have no operation upon the interior communications of the port. The Ocean, 3 *Rob.* 297. The Stert, 4 *Rob.* 65. But goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, and under charter-party with the ship proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation. The Maria, 6 *Rob.* 201. The penalty for a breach of blockade is remitted by the raising of the blockade between the time of sailing from the port and the capture. When the blockade is raised, a veil is thrown over every thing that has been done, and the vessel is no longer taken *in delicto*. The *delictum* completed at one period is by subsequent events entirely done away. The Lisette, 6 *Rob.* 387. A neutral ship coming out of a blockaded port in consequence of a rumour that hostilities were likely to take place between the enemy and the country to which the ship belongs is not liable to condemnation, though laden with a cargo, where the regulations of the enemy would not permit a departure in ballast. The Drie Vrienden, *Dodson*, 269. But the danger of seizure and confiscation by the enemy, must be immediate and pressing. The mere apprehension of possible and remote danger will not justify bringing a cargo out of a blockaded port. The Wasser Hundt, *Id.* 270. note.

[1] *Translation of Exhibit*, 287. A. 'On the following conditions have I given to Captain Henry Behrens, the command of the ship Fortuna, under Russian colours, lying at present in Riga.

1. Captain Behrens shall have 25 Alberts dollars, monthly wages.
2. The whole cabin freight has been allowed him.
3. He is to receive 5 per cent. primage.
4. Travelling expenses for the benefit of the vessel, as, likewise, victualling expenses for the use of the ship in port, consistent with moderation, have been allowed to the captain.

Captain Behrens, on his part, promises to watch the interest of his owner in every respect, and do the best he can for the benefit of the vessel.

For the fulfilment of the present contract I bind myself by my signature.

Riga, the 12th of August, 1813.
Per Proc. John Krause,
(Signed) Schultz.'

and terminate her voyage under the orders of the same house, under the auspices of which the adventure had originated and been so far conducted.

Under these circumstances, it was certainly incumbent upon the claimant to show the previous correspondence of the British with the Russian house, and the immediate dependence of the agent at the Havanna upon the Russian house for authority, instructions, and resources. When we come to compare the correspondence of Muhlenbruck with that of Smith, the agent in the St. Nicholas, we find here, also, a striking similitude. In that case, the supposed correspondence with the Russian principal is inclosed | under cover to the British house, p. 239
with a request that they would forward it. In this case the letters covering the invoice and bill of lading, and directed to M. & J. Krause, is confided to the captain, but with express instructions to forward it to the British house, and await their orders.

The material facts on which the court relies, in making up its judgment on the claim of the cargo, are the following :

In the first place, there is a general shade of suspicion cast over the whole case, by the fact that all the material papers relating to the transaction were mysteriously concealed in a billet of wood. Had there been nothing fraudulent intended, these papers ought to have been delivered along with the documentary evidence. But they were not discovered until betrayed by one of the crew. It is upon the investigation of these papers, principally, that the circumstances occur which discover the true character of this voyage.

Secondly. There is no evidence that this adventure was ever undertaken under instructions from M. & J. Krause. But there is evidence that every thing is set in motion at the touch of Bennet & Co. of London. And although they affect to act in the capacity of agents of the Russian house, even the rules of the common law would constitute them principals, in a case in which they cannot exhibit the authority under which they assume the character of agents. Again ; there is no evidence that any funds were furnished by the Russian house for the purchase of this cargo. But there is evidence, and | we think conclusive evidence, to show p. 240
that it was purchased on funds of the British house, remitted through the medium of the cargo of the Robert Bruce, a ship loaded by Bennet & Co., and despatched about the same time for the Havanna. In the letter of instructions of the 18th of March, 1813,[1] the | captain is told to p. 241

[1] '*London*, 18*th Nov.* 1813.

Capt. Henry Behrens,

As we have settled your ship's accounts by paying you a balance of 206*l.* 16*s.* 11*d.* up to November 13th, we now agree that the arrangement made with Messrs. M. & J. Krause, when you were last at Riga, shall continue in force for the pending voyage, as far as relates to your pay and primage, and we agree to pay you a gratuity of one hundred pounds (100*l.*) sterling, at the exchange current, whenever your voyage shall end, and likewise to allow you your cabin freight at the rate which the

proceed to the Havanna and await the arrival of Muhlenbruck, in the Robert Bruce, for orders; and in case of any accidents befalling that vessel, to apply to the Spanish house of Ychazo & Carricabura, at the Havanna, for farther instructions. And in a letter to the house of Lorent & Steinwitz, of Charleston, Bennet & Co. inform them, that the Fortuna is despatched to the Havanna to the address of Ychazo and Carricabura to obtain a freight for the Baltic, and request Lorent & Steinwitz to advise that house, if they could obtain a freight for her to any port in Europe. This correspondence is explained thus: the cargo of the Robert Bruce would probably be sufficient to load this ship with colonial produce; if she arrives in safety, the original adventure can then proceed, but should she be captured or lost, some return freight must then be found for the Fortuna. And accordingly we find in the letter to Bennet & Co.
p. 242 of the 24th March,[1] Muhlenbruck solicits | a credit on Jamaica or Cadiz

ship receives for her cargo. We have ordered Mr. J. F. Muhlenbruck to supply you with the cash necessary for your expenses in the Havanna when arrived out, which we beg may be as little as possible. And in case of your wanting any aid in Portsmouth, apply to Mr. Andrew Lindergreen, or in Plymouth to Messrs. Fuge & Son, or in Falmouth to Messrs. Fox & Son, who will supply you on showing this letter. We desire that you will, with your ship Fortuna, as speedily as possible, join the West India convoy now laying at Portsmouth taking sailing instructions, and proceed with the same convoy to the Havanna, where you will apply to Mr. J. F. Muhlenbruck, at Messrs. Ychazo & Carricabura, merchants there. You will receive at the Havanna Mr. J. F. Muhlenbruck's instructions, which you will follow implicitly. Mr. J. F. Muhlenbruck goes out to the Havanna on board the Robert Bruce, or some other vessel in the convoy, if the Robert Bruce is too late. Should any accident befal him in the vessel on board of which he goes, so that it is ascertained that Mr. J. F. Muhlenbruck cannot arrive at the Havanna, or if he should not be arrived there sixty days, (60) after you have arrived there, you will consult with Messrs. Ychazo & Carricabura what is best to be done. Should the convoy be gone on your arrival at Portsmouth you are at liberty to follow it without convoy. Wishing you a good voyage, we remain, &c.

(Signed,) BENNET & CO.

On your arrival at Leith apply to Ogilvie & Patterson.

[1] '*Havanna, 24th March*, 1814.

Messrs. Bennet & Co. London.

Gentlemen,

I have the honour to refer you to my last letters of 21st of February, and the 1st of March, of which I have sent you by different opportunities triplicates. The first letter principally contained to request the favour of your opening me a credit in Jamaica or Cadiz to be able to settle the surplus of the amount already shipped, which may be left out of the proceeds of the outbound shipment of the Robert Bruce. I hope that the above letter has reached you in time to grant me as soon as possible the favour, and beg to be convinced that only the greatest necessity engages me to request it; not being able to draw on either America or England. I have now the greatest pleasure to inform you of the safe arrival of the Robert Bruce, James Chessel, master, on the 19th, under protection of his majesty's ship North Star, Captain Thomas Coe, from Jamaica. From Cork she sailed with convoy, consisting of his majesty's ship Leviathan 74, Captain Adam Drummond, the Talbot 20, Captain Spelman Swaine, and the Scorpion of 18 guns. Therefore, she has been the whole voyage under convoy, and the insurers have to pay the full returns of 6 per cent. The North Star, which sails to-morrow, takes all the ready vessels for Europe out to Bermuda; from thence another convoy will be granted to protect them to England, or at least as far as the latitude of Halifax. The Russian ship Fortuna, Captain Behrens, laden with 1520 boxes assorted sugars bound to Riga, and for account and risk of Messrs. M. & J. Krause at that place, is ready to

as he expresses it, ' to be able to settle the surplus of the amount *already shipped* which may be left out of the proceeds of the outward bound shipment of the Robert Bruce.' Now the only shipment he had then made was by the Fortuna; and this letter gives advice of that | shipment, p. 243
as also of the arrival of the Robert Bruce, and the progress he had made in disposing of her cargo. The passage quoted means, therefore, (although somewhat obscurely expressed,) ' It is possible that the outward cargo of the Robert Bruce may not be sufficient to pay for the shipment already | made by the Fortuna, and you must, therefore, furnish me with a credit p. 244
to make up the deficiency.' Ychazo and Carricabura no doubt advanced for the purchase of the cargo of sugars upon the credit of the cargo of the Robert Bruce, and accordingly we find that house charging a commission for advancing. On these facts we are satisfied that the cargo was purchased with British funds.

Lastly; there is no evidence that Muhlenbruck was the agent of M. & J. Krause, and there is abundant evidence of his being the avowed and confidential agent of the British house. We see in the midst of the greatest anxiety to keep up the character of agent to the Russian house, this gentleman, without being aware of it, does an act which at once shows to whom he holds himself accountable. In his letter to Bennet & Co. of the 24th of March, he requests them to inform the Russian house, that he has made certain advances on account of the ship. But why request Bennet & Co. to do this, if he was himself in immediate

join this convoy. I enclose you invoice and bill of lading, which you will be pleased to forward with the first opportunity to the above friends. The Captain Behrens has got instructions from me to touch, according to the prevailing winds, either in Leith or in the channel. By the present circumstances on the continent of Europe, Messrs. M. & J. Krause may have been induced to send this cargo to a better market than it probably meets at Riga. Should they have given you any instructions concerning this vessel, the Captain Behrens has orders to wait for your kind information in regard of the farther destination, which orders from you I beg to send him as soon as you know at what port of the above mentioned he has arrived in England. Please to inform also, Messrs. M. & J. Krause, that I have advanced here the captain, 1332 dollars 4 cents, for the use of ship Fortuna. Next week the cargo of the Robert Bruce will be all delivered, and I endeavour to procure the highest prices possible. The Oznaburgs will sell as well as the Estopillas, but I am sorry you was not able to get more of the latter, and of a finer quality, being always the leading article of an assortment of linen. The prices of sugar are nearly the same, and the arrival of this convoy has brought them up $\frac{1}{8}$ to $\frac{1}{4}$ dollar higher. Coffee is lower, and I expect to buy and lay in good coffee, at 10 to 11 dollars. Messrs. Hubberts, Taylor, & Simpson inform me that I may not expect a convoy leaving Jamaica before the 30th of April. This same convoy can arrive here the 10th or 15th of May, and all possible exertion shall be made on my side to get the Robert Bruce laden before this time. I have till now not received an answer of Messrs. Hibberts, respecting the bills on London. Your kind letter of the 18th of December I have duly received. I am happy that the sugars are bought within your limits, and wish to be as fortunate with those wanted for the Robert Bruce's cargo.

I have the honour, &c.

(Signed,)

J. F. MUHLENBRUCK.'

connection and correspondence with the Russian house? The fact is, his correspondence with the Russian house was fictitious, and his object was to inform Bennet & Co. in reality, whilst he feigned to address himself to M. & J. Krause, and thus the letters to the latter house, covering the invoice and bill of lading, although of the same date with that to Bennet & Co. omits this piece of information, which, in a real correspondence, would be groundwork of a credit to himself, and contains
p. 245 nothing but the most general information, just enough in fact | to gloss over the transaction, and give it the aspect of reality.[1]

With regard to the vessel, it would be enough to observe, that if a neutral ship-owner will lend his name to cover a fraud with regard to the cargo, this circumstance alone will subject him to condemnation. But in this case there are, also, many circumstances to maintain a suspicion that the vessel was British property, or at least not owned as claimed. Although this court, from extreme anxiety to avoid subjecting a neutral to condemnation, has relaxed its rules in allowing time for further proof in a case where there was concealment of papers, yet
p. 246 nothing has been brought forward to support the neutral character | of the ship. No charter-party, no original correspondence, nothing, in fact, but those formal papers which never fail to accompany a fictitious, as well as a real, transaction. On the contrary, we find the captain, without any instructions from his supposed owners, submitting implicitly to the orders of Bennet & Co. in every thing; and the latter assuming even a control over the contract which he exhibits with his supposed owner in Riga, and expressing a solicitude about his expenses, which could only have been suggested by a consciousness that the house of B. & Co. would have to pay those expenses.

Upon the whole, we are satisfied that it is a case for condemnation both of ship and cargo.

Decree affirmed.

[1] (*Translation*)

'*Havanna, 24th March*, 1814.

Messrs. M. & J. Krause, Riga.

With the present I have the honour to send you the invoice and bill of lading of a cargo of Sugars for your esteemed account in the Fortuna, Captain H. Behrens. The ship could not take more than 1520 boxes white, and 600 Brown, with Campeachy wood, which was necessary for stowing; together $57,517 4, for which you will please give me credit. The sugars are of the new crop bought at a moderate price, and of a very good quality. And I flatter myself you will be content with the fulfilment of your kind commission. As there is a convoy leaving this place to-morrow for Bermuda, I found it advisable for the Fortuna to join the same, and wish her a very quick and safe passage. Of the above documents I shall send you duplicates when I have the honour to write you again. The prices of Russian articles are at present—Raven's Duck, $16, Canvas $42. Iron can only be sold with a loss, and in small quantities, as the price has fallen, &c.

(Signed,)

J. F. MUHLENBRUCK.'

The Atalanta.—Foussat, claimant.

(3 Wheaton, 409) 1818.

A neutral cargo found on board an armed enemy's vessel is not liable to condemnation as prize of war.

A question of proprietary interest. Farther proof ordered.

APPEAL from the circuit court for the district of Georgia.

This ship, being a British armed vessel, was captured in the year 1814, on a voyage from Bordeaux | to Pensacola, by the sloop of war p. 410
Wasp, and sent into Savannah, in Georgia, where she was libelled, and condemned in the district court as prize of war. The cargo, which was claimed for M. Foussat, a merchant domiciled at Bordeaux, was also condemned. On appeal to the circuit court as to the cargo, farther proof was ordered, and restitution decreed to the claimant. The cause was then brought by appeal to this court.

The vessel was owned by Messrs. Barclay, Salkeld & Co. of Liverpool, who were also the owners of large cotton plantations near Pensacola. She sailed from Liverpool on the 14th of August, 1814, for Bordeaux, laden with a cargo, part of which, about equal in value to the cargo subsequently taken in at Bordeaux, belonged to the owners of the ship; and the documentary evidence showed that her ultimate destination was Pensacola or the Havanna. A few days after the arrival of the vessel at Bordeaux she was chartered by the claimant, who then had a vessel of his own lying unemployed in that port, and the cargo claimed was put on board in September, 1814. One Pritchard, who sailed in the vessel, was a British subject, and according to some of the testimony, acted as supercargo. At the time of the capture, the master and Pritchard were taken out of the vessel and carried on board the Wasp, which ship has never since been heard of, and is supposed to have been lost at sea. The proceedings in the district court were extremely irregular; no examinations of the prisoners on the standing interrogatories having been taken, and witnesses having been examined in the first instance, | who neither belonged to the captured nor the capturing vessel. The p. 411
farther proof produced by the claimant in the court below consisted of an affidavit of the claimant, swearing to the property in himself, and a certificate of two royal notaries at Bordeaux, that the copy of a letter from the claimant to Vincent Ramez, the consignee at Pensacola, dated the 28th of August, 1814, and stating the object of the adventure, was truly extracted from the claimant's letter-book.

Mr. *Berrien*, for the appellants and captors, argued, that the cargo was liable to condemnation, 1st. As being laden on board an enemy's

armed vessel: and, 2dly, on account of the defects in the proofs of proprietary interest. That, although the doctrine inculcated in the case of the Nereide,[1] tended to show that the circumstance of the cargo being found on board an armed enemy's vessel was not, in itself, a substantive cause of condemnation, the principle had not been decided by a majority of the court; Mr. Justice Johnson's opinion limiting it to the case of a neutral at peace with all the world.[2] This was not the case of Mr. Pinto, but it was the case of M. Foussat. Just before the decision of the Nereide, Sir William Scott had held the contrary doctrine,[3] and decreed salvage for the recapture of neutral goods previously taken by one of our cruizers
p. 412 on board an armed British ship, upon the ground that | the American courts might justly have condemned the property. But even supposing this circumstance not to be a substantive cause of condemnation, it inflames the suspicions of hostile interests, arising from the other circumstances of the case, and does not admit of an explanation consistently with the pretended neutral character set up by the claimant. The inconvenience of exposing himself to these suspicions must have been compensated by the protection afforded by an armed force, or that protection would not have been resorted to. The case is, in that respect, distinguished to its disadvantage from that whole class of cases, including the St. Nicholas and others,[4] where *fraud*, and not *force*, was resorted to, in order to evade, instead of directly resisting belligerent rights. The principle of reciprocity, as a doctrine of prize law, has been overruled by the court,[5] and, therefore, it cannot be contended that the rule of the French prize code, by which the having an enemy's supercargo on board is a cause of condemnation, is to be retaliated upon the claimant. But this fact increases the improbability that a Frenchman, who must have known the law of his own country in this respect, would have exposed his property to the risk of confiscation in the courts of a country whose prize law he could not know, because it was still unsettled. All the other circumstances of the case tend to the conclusion that it was not his property, but that of the British ship owner. |

p. 413 Mr. *Sergeant*, contra, contended, that the case of the Fanny, even if it were not contradicted by that of the Nereide, was not directly in point. Sir W. Scott there goes on the ground of the *probability* or danger of condemnation in our courts, as affording a reason for giving salvage Besides, the Fanny was a *commissioned*, as well as armed vessel; which the Nereide and the Atalanta were not. But it must be confessed that the decision in the Fanny was a very careless, not to say superficial, judgment. The judge agrees that the Portuguese flag was an inadequate

[1] 9 *Cranch*, 388.
[2] *Id.* 431.
[3] The Fanny, *Dodson*, 443. July 20th, 1814.
[4] 1 *Wheaton*, 417.
[5] The Nereide, 9 *Cranch*, 422.

protection, and yet holds the neutral liable to condemnation for taking shelter under a belligerent force. With all due respect to the great man by whom it was pronounced, it may be said to be tinctured with some of those peculiarities which mark the conduct of the tribunals of a great maritime country, bent on the assertion of its pretensions by its overwhelming naval power. At all events, it does not form a law for this court, any more than the principle of retaliation which has been already repudiated by the court. The proceedings in the present case have been marked by irregularities subversive of that justice which is due to neutrals, and by a neglect of those forms which are a part of the silent compact by which they agree to submit to the exercise of the harsh and inconvenient prerogative of search. The cause was not heard in the court of first instance upon the ship's papers and the preparatory depositions, before extraneous testimony was let in, by an order for farther proof. The salutary principles of prize practice, which afford a security to | neutrals in a trial in the courts of the captor, that would otherwise be p. 414
grossly oppressive, have been wholly disregarded. It is a rule of justice in admiralty courts, whether of instance or prize, that where the original evidence appears to be clear, the court will not indulge in extraneous suspicions.[1] If the employment of *an armed* enemy's vessel be innocent, no unfavourable inference can legally be drawn from it any more than from the employment of an *unarmed* belligerent carrier. Both this circumstance and the employment of an *English* supercargo (if he was employed) would rather show that no fraud was intended, since the annals of the prize court do not afford a single instance of a fraudulent case which was not entirely covered with the neutral garb.

The *Attorney-General*, in reply, insisted, that the fact of the cargo being captured on board an armed belligerent ship, raised a strong presumption, throwing the *onus probandi* on the claimant with more than usual weight. The only evidence to relieve this presumption, was the oath of the claimant himself, unsupported by that of any other witness, or by any documentary evidence; and that too under an order for farther proof; a mere test affidavit, without which a claimant can in no case receive restitution, but which is no evidence, or next to none, in a case of the least doubt or difficulty. |

March 4th. p. 415

Mr. Chief Justice MARSHALL, delivered the opinion of the court. This vessel was captured on a voyage from Bordeaux to Pensacola by the sloop of war Wasp, and sent into Savannah in Georgia, where she was libelled and condemned as prize of war. The cargo was claimed for Mons. Foussat a French merchant residing at Bordeaux. In the district

[1] The Octavia, 1 *Wheat.* 23, note *e*.

court the cargo was condemned as enemy's property, avowedly on the principle that this character was imparted to it by the vessel in which it was found. On an appeal to the circuit court, farther proof was directed, and this sentence was reversed, and restitution decreed to the claimant. From this decree the captors appealed to this court.

It has been contended, that this cargo ought to be condemned as enemy's property, because, 1st. It was found on board an armed belligerent.

2d. It is, in truth, the property of British subjects.

On the first question, the case does not essentially differ from that of the Nereide. It is unnecessary to repeat the reasoning on which that case was decided. The opinion then given by three judges is retained by them. The principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be, and probably will be changed, or so impaired as to leave no object to which it is applicable; but so long as the principle shall be acknowledged, this court must reject constructions which render it totally inoperative.

2d. Respecting the proprietary interest, much doubt is entertained. In addition to the extraordinary fact of employing a belligerent carrier,
p. 416 while a neutral | vessel belonging to the alleged owner of the cargo lay in port, there are circumstances in this case calculated to awaken suspicion, which the claimant ought to clear up, so far as may be in his power.

The return cargo of the Atalanta was to be in cotton, and Berkely, Salkeld & Co., the owners of the vessel, were also owners of large cotton plantations, the produce of which might readily be shipped from Pensacola. The papers show that the Atalanta sailed from Liverpool, where her owners reside, with a cargo for Bordeaux, a part of which, about equal in value to the cargo taken in at Bordeaux, belonged to Berkley, Salkeld & Co., and that her ultimate destination, at the time of sailing, was Pensacola, or the Havanna.

Within a day or two after her arrival at Bordeaux, she was chartered by the claimant for the voyage on which she was captured, and the cargo he now claims was put on board. A Mr. Pritchard sailed in the vessel, who was a British subject, and who has been represented in some of the testimony as a supercargo.

There are, undoubtedly, circumstances to diminish the suspicion which must be excited by those that have been mentioned. The proceedings have been very irregular; no examinations *in preparatorio* have been taken. The captain, and probably the mate, with the alleged supercargo, were carried on board the Wasp, and have perished at sea, and Mr. Foussat, whose character is unexceptionable, has sworn positively to his interest. Yet, this interest can be, and therefore ought to

be, proved by other testimony, and | it is in the power of Mr. Foussat p. 417
to explain circumstances, which, as they now appear, cannot be disregarded. The court, therefore, requires farther proof, which Mr. Foussat is allowed to produce, to the following points :

1st. To his proprietary interest in the cargo. To show how and when it was purchased.

2d. To produce his correspondence with Barclay, Salkeld & Co., if any, respecting this voyage.

3d. To explain the circumstances relative to the original destination to Pensacola, when the Atalanta sailed from Liverpool.

4th. To explain the character of Mr. Pritchard, and his situation on board the Atalanta.

5th. To establish the genuineness of the letter of the 28th of August, and say by what vessel it was sent.

6th. To show to whom that part of the cargo of the Atalanta, on the voyage from Liverpool to Bordeaux, which belonged to Barclay, Salkeld & Co., was consigned, and how it was disposed of.

7th. To produce copies of the letters of Barclay, Salkeld & Co. relative to this transaction, or account for their non-production.

Mr. Justice JOHNSON. When this cause was considered in the court below, I entertained great doubts on the subject of the proprietary interest. But those doubts have here been satisfactorily cleared up. I am now satisfied, that no inference unfavourable to the claim can fairly be drawn from the circumstance of this | cargo being laden on board p. 418
an armed belligerent. If it had been intended to throw a veil of neutrality over hostile property, it is more probable that a neutral carrier would have been used than a belligerent ; and as to the dangers supposed to have been unnecessarily incurred, of being captured and turned away from the destined market, it is more than probable that a chance of being captured and carried into an American port, so far from being prejudicial to the adventure, would have enhanced its profits. The claimant, then, if conscious of his innocence, had no evil to apprehend from capture ; on the contrary, as the cargo was calculated for an American market, it might, in case of capture, have reached its destination directly ; whereas, if it had arrived at Pensacola, its route would have been more circuitous. With regard to the fact, that the voyage, in its inception, was destined to Pensacola, that I think also satisfactorily explained. It was in strict pursuance of her original destination ; on her arrival at Bordeaux she was put up for Pensacola, and chartered by this claimant for the voyage. The instructions to the captain show that it was not fixed, whether, on her return voyage, she should be laden on owners' account or not ; and it probably depended upon the contingency of her being taken up at Bordeaux for a return freight. As to the facts

that Pritchard, the supercargo to Bordeaux, continued in that capacity on the voyage to Pensacola; that Ramez, the consignee, was the agent of the ship-owner; and that the present cargo was purchased with the freight and cargo to Bordeaux, I am now satisfied that they are unsup-
p. 419 ported by the | evidence. That Pritchard should continue to be designated by the appellation of supercargo among the crew was to be expected from his having been known among them by that epithet on the voyage to Bordeaux, and that Ramez, who had been recommended to Salkeld, Barclay & Co., for his integrity by their agent, should be by them, or by some other, recommended to the patronage of Foussat, was perfectly consistent with ordinary mercantile intercourse; and in the total absence of proof, that the freight, or proceeds of the outward cargo of the ship ever came to the hands of Foussat, there is no sufficient reason for conjecturing that the cargo laden on board for Pensacola was purchased with those funds.

I am, therefore, of opinion, that the proprietary interest is sufficiently established. But, as the proprietary interest is altogether immaterial, if lading a neutral cargo on board an armed belligerent is, *per se*, a ground of condemnation, it becomes necessary to consider that question.

It has long been with me a rule of judicial proceeding, never, where I am free to act, to decide more in any case than what the case itself necessarily requires; and so far only, in my view, can a case be considered as authority. Accordingly, when the case of the Nereide was before this court, I declined expressing my opinion upon the general question, because the cargo, considered as Spanish property, was exposed to capture by the Carthagenian and other privateers, and considered as belonging to a revolted colony, was liable to Spanish capture. The neutral
p. 420 shipper, therefore, could not be charged with | evading our belligerent rights, or putting off his neutral character when placing himself under the protection of an armed belligerent, when sailing, as that shipper was, between Scylla and Charybdis, he might accept of the aid or protection of one belligerent, without giving just cause of offence to another.

But a case now occurs of a vessel at peace with all the world; and to give an order for farther proof without admitting the rule, that lading a neutral cargo on board an armed belligerent is not, *per se*, a cause of forfeiture appears to me nugatory.

It is true, this is not a case of a commissioned or cruizing vessel, and I have no objection to reserving the question on such a case until it shall occur, if it can be done consistently with the principles upon which I found my opinion; but in my view, there is no medium, and no necessity for a belligerent to insist on any exception in his favour. On the contrary, I consider all the evils as visionary that are dwelt

upon as the result of thus extending this right in favour of neutrals. No nation can be powerful on the ocean that does not possess an extensive commerce; and if her armed ships are to be converted into carriers, (almost, I would say, an absurd supposition,) her own commerce would have the preference; so that the injury could never be of any real extent. But should it be otherwise; what state of things ought one belligerent more devoutly to desire than that the whole military marine of her enemy should be so employed, and bound down to designated voyages, from which they were not at liberty to deviate? It would be curious to see a government thus involving | itself with merchant shippers in p. 421
questions of affreightment, assurance, deviation, average, and so forth; the possibility may be imagined, but the reality will never exist.

The general rule in this case, it will be observed, is controverted by no one; nor is it denied that it is incumbent on the captor to maintain the exception contended for. It is for him to prove, that the acknowledged right of the neutral to employ a belligerent carrier does not include the right of employing an *armed* belligerent carrier.

In order to support this proposition, arguments are usually adduced, from the silence of writers upon the subject; from decisions in analogous cases; and from its general inconsistency with the belligerent right of search or adjudication.

If it be asked, why have writers, and particularly the champions of neutral rights been silent on this subject? I think the answer obvious. Practically it is of very little general importance either to neutrals or belligerents, and those who are more disposed to favour belligerent claims would naturally avoid a doctrine which they could not maintain, whilst all who wrote for the benefit of those who are to read would avoid swelling their volumes with unnecessary discussions, or raising phantoms for the amusement of laying them. The silence of the world upon the subject is, to my mind, a sufficient evidence that public sentiment is against it. It is impossible, but that in the course of the long and active naval wars of the last two centuries, cases must have occurred in which it became necessary to consider this | question; and though it had escaped p. 422
the notice of jurists, it must have been elicited by the avarice of captors, the ingenuity of proctors, or the learned researches of courts of prize. Yet we find not one case on record of a condemnation as prize of war on the ground of armament, nor a dictum in any of the books that suggests such an exception. But the rule itself is laid down everywhere; and in my view, laying down the rule without the exception, is in effect a negative to the exception.

But it is not true that this subject has altogether escaped the notice of writers on the law of prize. There is on record one opinion on this subject, and that of great antiquity and respectability, and which may

have given the tone to public opinion, and thus account for the silence of subsequent writers: I allude to the dictum extracted from Casaregis, in which the author asserts, 'that if a vessel laden with neutral merchandize attack another vessel, and be captured, her cargo shall not be made prize, unless the owner of the goods, or his supercargo, engage in the conflict.' Now, if an actual attack shall not subject to forfeiture, much less shall arming for defence; and it is fairly inferrable from the passage that the author had in his view, the case of an armed belligerent carrier, or he would not have represented her as the attacking vessel.

But it is contended, that decisions have taken place in the courts of other states, in analogous cases, which cannot be reconciled with the principle on which the claimant rests his defence. On this subject
p. 423 I will make one general remark: I acknowledge | no decision as authority in this court but the decisions of the court, as far as necessary to the case decided; and the decisions of the state courts, as far as they go to fix the landmarks of property; and, generally, the *lex loci* of the respective states. All other decisions I will respect for as much as they are worth in principle.

The decisions relied on in this part of the argument are those by which neutral *vessels* under *neutral* convoy, were condemned for the unneutral act of the convoying vessel; and those in which neutral *vessels* have been condemned for placing themselves under protection of a *hostile* convoy. With regard to the first class of cases, it is very well known that they originated in the capture of the Swedish convoy, at a time when Great Britain had resolved to throw down the glove to all the world on the principle of the northern confederacy. It was, therefore, a measure essentially hostile. But independently of this, there are several considerations which present an obvious distinction between both classes of cases and this under consideration. A convoy is an association for a hostile object. In undertaking it, a nation spreads over the merchant vessel an immunity from search, which belongs only to a national ship; and by joining a convoy, every individual ship puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine, and adds to the numerical, if not to the real, strength of the convoy. If, then, the association be voluntary, the neutral, in suffering the fate of the whole, has only to regret his own folly in wedding |
p. 424 his fortune to theirs; or if involved in the aggression or opposition of the convoying vessel, he shares the fate which the leader of his own choice either was, or would have been made liable to, in case of capture. To elucidate this idea, let us suppose the case of an individual, who voluntarily fills up the ranks of an enemy, or of one who only enters upon the discharge of those duties in war which would otherwise take men from the ranks; and the reason will be obvious why he should be treated as

a prisoner of war, and involved in the fate of a conquered enemy. But it is not so with the *goods* which constitute the lading of a ship; those give neither real nor numerical strength to an enemy, but rather embarrass and impede him. And even if it be admitted that, in all cases, a cargo should be tainted with the offence of the carrying vessel, it will be seen that the reason upon which those cases profess to proceed is not applicable to the case of neutral goods on board a hostile carrier. Resistance, either real or constructive, by a *neutral* carrier, is, with a view to the law of nations, unlawful; but not so with the *hostile* carrier; she had a right to resist, and in her case, therefore, there is no offence committed to communicate a taint to her cargo.

But it is contended, that the right to use a hostile, armed carrier is inconsistent with the belligerent's right of search, or of capture, or of adjudication; for on this point the argument is not very distinct, though I plainly perceive it must be the right of adjudication, if any, that is impaired. The right of capture applies only to enemy ships or goods; the right of search to | *enemy goods* on board a *neutral* carrier; p. 425
and therefore it must be the right of adjudication that is supposed to be impaired, which applies to the case of goods found either on board of a neutral or belligerent, and this mere *scintilla juris* is at last the real basis upon which the exception contended for must rest. But in what manner is this right of adjudication impaired? The neutral does not deny the right of the belligerent to decide the question of proprietary interest. If it be really neutral, of what consequence is it to the belligerent who is the carrier? He has no right to capture it; and if it be *hostile* covered as *neutral*, the belligerent is only compelled to do that which he must do in all ordinary cases, subdue the ship before he gets the cargo. It cannot be expected that the belligerent will rest his complaint upon the humiliating ground of his inability to subdue his enemy; and if he should, the neutral may well reply it is his affair or his misfortune, but ought not in any of its consequences to affect the rights of the neutral. Nor is it at all certain that lading on board an enemy carrier is done at all times with an intent to avoid capture; it may be to solicit it; as in the case of the late war, when British goods, though neutral owned, could only be brought into our market through the medium of capture. There, instead of capture being a risk of the voyage, it was one of the chances of profit. And the hostile carrier may have been preferred to the neutral, with the express view of increasing the chances of capture.

When we come to analyze, and apply the arguments | of the defenders p. 426
of this exception, I think it will be found that they expose themselves to the imputation of unfairness, in professing to sustain an exception, when they mean to aim a blow at the whole neutral right of using a belligerent carrier; or they do not follow up their reasoning in its conse-

quences, so as to be sensible of the result to which it leads. The exception which exhausts the principal rule must be incorrect, if the rule itself be admitted as a correct one; it is, in fact, an adverse proposition, and it appears to demonstrate that all the arguments urged in favour of the exception, now under consideration, if they prove any thing, prove too much, and obviously extend to the utter extinction of the rule itself, or the destruction of every beneficial consequence that the neutral can derive from it. Thus, if it be unlawful to employ an *armed* belligerent carrier, then what proportion of armament or equipment will render it unlawful? Between one gun and one hundred, the difference is only in degree, not in principle; and if it is left to the courts of the belligerent to apply the exception to successive cases as they arise, it evidently becomes a destroying principle, which will soon consume the vitals of the rule. And the neutral will soon consider it as a snare, not a privilege.

Again; the proposition is that the neutral may employ a hostile carrier; but the indispensable attributes of a state of hostility are the right of armament, of defence, of attack, and of capture; if then you strip the belligerent of any one, or more of these characteristics, the
p. 427 proposition is falsified, for he can no longer | be called a hostile carrier; he assumes an amphibious anomalous character, for which there is no epithet applicable unless it be that of semi-hostile. And what becomes of the interest of the neutral? It is mockery to hold out to him the right of employing a hostile carrier, when you attach to the exercise of that right consequences, which would make it absurd for a belligerent to enter into a charter party with him. If resistance, arming, convoying, capturing, be the acknowledged attributes and characteristics of the belligerent, then deprive him of these attributes, and you reduce him to a state of neutrality, nay, worse than a state of neutrality; for he continues liable to all the danger incident to the hostile character, without any of the rights which that character confers upon him. What belligerent could ever be induced to engage in the transportation of neutral goods, if the consequence of such an undertaking be that he puts off his own character, and assumes that of the neutral, relinquishes his right of arming, or resisting, without acquiring the immunities or protection of the neutral character. It is holding out but a shadow of a benefit to the neutral.

Some confusion is thrown over this subject by not discriminating carefully between the cases where a *neutral* shipper, and a *hostile* carrier, are the parties to the contract, and those in which both *shipper* and *carrier* are hostile. In the latter case, the carrier, when armed, may fairly be understood to have undertaken to fight, as well as to carry. But when a neutral is the shipper, the carrier, (independently of specific

contract,) is left to fight, or not, as he shall deem proper. | Thus, if a neutral p. 428
shipper charter an unarmed belligerent, he would not be released from his contract, should the belligerent put arms or men into his ship; otherwise taking ordinary and prudent precaution for the safety of his vessel, precautions which would in general lessen the insurance on the cargo itself, would be a violation of the master's contract. And on the other hand, a belligerent master would be under no obligation to the neutral to fight, if met by an enemy on the ocean, even though particularly required by the neutral shipper. There is then nothing in that argument which is founded on the supposition that the neutral is assisting in expediting a naval hostile equipment, when he employs a belligerent carrier; on the contrary, he either embarrasses the belligerent in, or detaches him from, the operations of war.

It makes no difference in my view, whether the right of using a hostile carrier, be considered as a voluntary concession in behalf of neutrals, or as a conclusion from those principles which form the basis of international law. We find it emanating from the same source as the right of search and adjudication, and it is of equal authority. If in practice it should ever be found materially detrimental to acknowledged national rights, it may be disavowed or relinquished; or should our own legislative power ever think proper to declare against the right, it can impose the law upon its own courts. But until it shall be so relinquished, or abrogated, we are bound to apply it with all the beneficial consequences that it was intended to produce.

I do not, however, consider it as a mere voluntary | concession in favour p. 429
of neutral commerce. Were it now, for the first time, made a question whether a neutral should be permitted to use a hostile carrier, I should not hesitate to decide that it would be exceedingly harsh and unreasonable to deny to the neutral the exercise of such a right. The laws of war and of power, already possesses sufficient advantages over the claims of the weak, the wise, and pacific. I am, in sentiment, opposed to the extension of belligerent rights. Naval warfare, as sanctioned by the practice of the world, I consider as the disgrace of modern civilization. Why should private plunder degrade the privileges of a naval commission? It is ridiculous at this day, to dignify the practice with the epithet of reprisal. If it be reprisal, we may claim all the benefit of the example of the savages in our forests, to whom the practice is familiarly known, but we must yield to them in the reasonableness of its application, for they really do apply the thing taken, to indemnify the party injured. The time was when war, by land and by sea, was carried on upon the same principles. The good sense of mankind has lessened its horrors on land, and it is scarcely possible to find any sufficient reason why an analogous reformation should not take place upon the ocean. The present time is the most favourable

that has ever occurred for effecting this desirable change. There is a power organized upon the continent of Europe that may command the gratitude and veneration of posterity by determining on this reformation. It must take effect when they resolve to enforce it. |

p. 430 We find the law of nations unfortunately embarrassed with the principle that it is lawful to impose a direct restraint upon the industry and enterprize of a neutral, in order to produce an incidental embarrassment to an enemy. In its original restricted application, this principle was of undoubted correctness, and did little injury ; but in the modern extended use which has been made of it, we see an exemplification of the difficulty of restraining a belligerent in the application of a convenient principle, and an apposite illustration of one of the objections to admitting the exception unfavourable to the use of an armed hostile carrier. But surely there must be some limit to the exercise of this right by a belligerent. And it is incumbent upon him to show that the restraint imposed upon the neutral, is indispensable to the exercise of his own acknowledged right, or the punishment inflicted on him to be justly due to the violation of his neutral obligations. Now, what violation of belligerent right, or neutral obligation, can result from the employment of a hostile carrier ? If employed to break a blockade, carry goods that are contraband of war, or engaged in other illicit trade, the goods are liable to condemnation, on principles having no relation to this case. But if employed in lawful commerce, where is the injury done to the belligerent ? There is no partiality exhibited on the part of the neutral ; for the belligerents are necessarily excluded from each others ports, and cannot be employed, except each in the commerce of his own country ; and so far from violating

p. 431 any belligerent right, the neutral | tempts the ship of the enemy from a place of safety to expose her to hostile capture, or detaches her from warlike operations, and engages her in pursuits less detrimental to the interest of her enemy, than cruizing or fighting. To the neutral the right of employing a hostile carrier may be of vital importance. The port of the enemy may be his granary ; he may have no ships of his own, no other carrier may be found there ; no other permitted to be thus employed, or no other serve him as faithfully, or on as good terms. So, also, with regard to the produce of his own industry, his only market may be in the port of one of the belligerents, and his only means of access to it through the use of the carriers of that port.

A case has been referred to in the argument : the case of the Fanny in *Dodson's Reports* ; in which the court of admiralty in England granted salvage upon goods shipped on board an armed enemy carrier captured by an American privateer, and re-captured by the British. The ground on which the court professes to proceed, according to the report, is, that these goods were in danger of being condemned in our courts, on the

ground that the shipper had quit the protection of his neutrality, and resorted to the protection of arms.

Had the question decided in that case been one of forfeiture, and not of salvage, that decision would have been in point. But even then I should have claimed the privilege exercised by the learned judge who presides in that court with so much usefulness to his country, and honour to himself, of founding my own | opinions upon my own researches and p. 432 resources. Should a similar case ever again occur in that court, and the decisions of this court have passed the Atlantic, that learned judge will be called on to acknowledge that the danger of condemnation was not as great as he had imagined; and that independent of the question agitated in this case, this court would have had respect to the embarrassing state of warfare in which the people of Buenos Ayres were involved, and adjudged that the precautions for defence were intended against their enemies rather than their friends. With regard to the award of salvage, it is well known that the grant of salvage upon the recaption of a neutral was the favourite offspring of that judge's administration; until then no contribution had been levied upon neutral commerce to give activity to hostile enterprise. When a question of salvage on such a recapture shall occur in this court those adjudications will come under review; but this case cannot be considered in point until this court is called on to decide whether the British example shall prevail, or the obvious dictate of reason, that the neutral should be liberated and permitted to pursue his voyage, or at least to decide for himself in which of the belligerent courts his rights will be most secure.

Upon the whole, I am fully satisfied that the decision in the case of the Nereide, was founded in the most correct principles, and recognize the rule, that lading on board an armed belligerent is not, *per se*, a cause of forfeiture; as not only the most correct | on principle, but the most liberal p. 433 and honourable to the jurisprudence of this country.

Farther proof ordered.[1]

[1] Mr. Justice TODD and Mr. Justice DUVALL did not sit in this cause.

The Anne.—Barnabeu, claimant.

(3 Wheaton, 435) 1818.

The captors are competent witnesses upon an order for farther proof, where the benefit of it is extended to both parties.

The captors are always competent witnesses, as to the circumstances of the capture, whether it be joint, collusive, or within neutral territory.

It is not competent for a neutral *consul*, without the special authority of his government, to interpose a claim on account of the violation of the territorial jurisdiction of his country.

Quære, Whether such a claim can be interposed, even by a public minister, without the sanction of the government in whose tribunals the cause is pending ?

A capture, made within neutral territory, is, as between the belligerents, rightful ; and its validity can only be questioned by the neutral state.

If the captured vessel commence hostilities upon the captor, she forfeits the neutral protection, and the capture is not an injury for which redress can be sought from the neutral sovereign.

Irregularities on the part of the captors, originating from mere mistake, or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit their rights of prize.

APPEAL to the circuit court for the district of Maryland. |

p. 436 The British ship Anne, with a cargo belonging to a British subject, was captured by the privateer Ultor, while lying at anchor near the Spanish part of the island of St. Domingo, on the 13th of March, 1815, and carried into New-York for adjudication. The master and supercargo were put on shore at St. Domingo, and all the rest of the crew, except the mate, carpenter, and cook, were put on board the capturing ship. After arrival at New-York, the deposition of the cook only was taken, before a commissioner of prize, and that, together with the ship's papers, was transmitted by the commissioner, under seal, to the district judge of Maryland district, to which district the Anne was removed, by virtue of the provisions of the act of congress of the 27th of January, 1813, ch. 478

Prize proceedings were duly instituted against the ship and cargo, and a claim was afterwards interposed on behalf of the Spanish consul, claiming restitution of the property, on account of an asserted violation of the neutral territory of Spain. The testimony of the carpenter was thereupon taken by the claimant, and the captors were also admitted to give testimony as to the circumstances of the capture ; and, upon the whole evidence, the district court rejected the claim, and pronounced a sentence of condemnation to the captors. Upon appeal to the circuit court, peace having taken place, the British owner, Mr. Richard Scott, interposed a claim for the property, and the decree of the district court was affirmed, *pro formâ*, to bring the cause for a final adjudication before this court. |

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Mr. *Harper*, for the appellant and claimant, argued, that the captors were incompetent witnesses, on the ground of interest, except when farther proof was imparted to them ;[1] and that they were not entitled to the benefit of farther proof in this case, being *in delicto*. The irregularity of their proceedings, and the violation of the neutral territory, would not only exclude them from farther proof, but forfeit their rights of prize. The testimony being irregular, it must appear, *affirmatively*, that it was taken by consent, where the irregularity consists, not in a mere omission of form, but in the incompetency or irrelevancy of the evidence. The testimony of the captors being excluded from the case, the violation of the neutral territory would appear uncontradicted. The text writers affirm the immunity of the neutral territory from hostile operations in its ports, bays, and harbours, and within the range of cannon shot along its coasts.[2] Nor can it be used as a station from which to exercise hostilities.[3] As to the authority by which the claim was interposed, the Spanish consul's was sufficient for that purpose ; especially under the peculiar circumstances of the times when, on account of the unsettled state of the government in Spain, no minister from that country was received by our government, | but the former consuls were continued in the exercise of their p. 438
functions by its permission. In one of the cases in the English books, the Portuguese consul was allowed to claim on account of violated territory, although it does not appear that he had any special instructions from his sovereign for that purpose.[4] But even supposing the powers of a consul not adequate to this function, whence arises the necessity that the neutral government should interfere in general ? Because the enemy proprietor is absolutely incapable of interposing a claim on this, or any other ground. But here the incapacity of the claimant is removed, his *persona standi in judicio* being restored by the intervention of peace. He may, consequently, assert his claim upon every ground which shows that the capture, though of enemy's property, was originally unlawful and void.

Mr. *D. B. Ogden* and Mr. *Winder*, contra, contended, that the captors were admissible witnesses in this case, as they are in all cases respecting the circumstances of the capture ; such as collusive and joint captures, where the usual simplicity of the prize proceedings is necessarily departed from. So, also, their testimony is generally admitted on farther proof.[5]

[1] The Adriana, 1 *Rob.* 34. The Haabet, 6 *Rob.* 54. L'Amitie, *Id.* 269. note (*a.*)
[2] *Vattel, L.* 3. *ch.* 7. § 132. *Id. L.* 1. *ch.* 23. § 289. *Bynk. Q. J. Pub. L.* 1. *c.* s. *Martens L.* 8. s. *ch.* 6. § 6. *Azuni, part* 2. *ch.* 5. *art.* 1, § 15.
[3] The Twee Gebroeders, 3 *Rob.* 162. The Anna, 5 *Rob.* 332.
[4] The Vrow Anna Catharina, 5 *Rob.* 15.
[5] The Maria, 1 *Rob.* 340. The Resolution, 6 *Rob.* 13. The Grotius, 9 *Cranch*, 368. The Sally, 1 *Gallis.* 401. The George, The Bothnea, and The Janstaff, 1 *Wheaton*, 408.

A claim founded merely upon the allegation of a violation of neutral
p. 439 territory, is a case peculiarly requiring the | introduction of evidence from all quarters, the captors being as much necessary witnesses of the transaction as are the captured persons. Every capture of enemy's property, wheresoever made, is valid, *prima facie*; and it rests with the neutral government to interfere, where the capture is made within neutral jurisdiction. The enemy proprietor has no *persona standi in judicio* for this or any other purpose. But here the suggestion of a violation of the neutral territory is not made by proper authority. All the cases show that a claim for this purpose can only be interposed by authority of the government whose territorial rights have been violated.[1] The public ministers of that government may make the claim, because they are presumed to be fully empowered for that purpose: But a consul is a mere commercial agent, and has none of the diplomatic attributes or privileges of an ambassador; he must, therefore, be specially empowered to interpose the claim, in order that the court may be satisfied that it comes from the offended government. A consul may, indeed, claim for the property of his fellow subjects, but not for the alleged violation of the rights of his sovereign; because it is for the sovereign alone to judge when those rights are violated, and how far policy may induce him silently to acquiesce in those acts of the belligerent by which they are supposed to be infringed. There is only one case in the English books, where a claim of this sort
p. 440 appears to have been made | by a consul; and from the report of that case it may be fairly inferred that he was specially directed by his government to interpose the claim.[2] But even the Spanish government itself has not conducted with that impartiality between the belligerents, which entitles it to set up this exemption.[3] Its territory was, during the late war, permitted to be made the theatre of British hostility, and in various instances was violated with impunity. Spain was incapable, or unwilling, at that time, to maintain her neutrality in any part of her immense dominions. In this very case the captured vessel was not attacked; she was the aggressor: and, in self-defence, the privateer had not only a right to resist, but to capture. The local circumstances alone would have prevented the Spanish government from protecting the inviolability of its territory, on a desert coast, and out of the reach of the guns of any fortress. Bynkershoek[4] and Sir William Scott hold, that

[1] The Twee Gebroeders, 3 *Rob.* 162. note. The Diligentia, *Dodson*, 412. The Eliza Ann, *Id.* 244.

[2] The Vrow Anna Catharina, 5 *Rob.* 15.

[3] The Eliza Ann, *Dodson*, 244, 245.

[4] *Q. J. Pub. L.* 1. *ch.* 8. Uno verbo: territorium communis amici valet ad prohibendum vim, quæ ibi inchoatur, non valet ad inhibendam, quæ, extra territorium inchoata, dum fervet opus, in ipso territorio continuatur.' This opinion of Bynkershoek, in which Casaregis seems to concur, (*Disc.* 24, *n.* 11.) is reprobated by several writers. *De Habreu, Part* 1, *ch.* 4. § 15. *Azuni, part* 2. *c.* 4. *art.* 1. *Valin, Traité des Prises, ch.* 4. sec. 3. *n.* 4. *art.* 1. *Emerigon, Des Assurances, Tom.* 1. *p.* 449.

a flying enemy | may lawfully be pursued and taken in such places, if the p. 441
battle has been commenced on the high seas.[1] *A fortiori*, may an enemy, who commences the first attack within neutral jurisdiction, be resisted and captured. But should all these grounds fail, the captors may stand upon the effect of the treaty of peace in quieting all titles of possession arising out of the war.[2] As between the American captors and the British claimant, the proprietary interest of the | latter was completely devested p. 442
by the capture. The title of the captors acquired in war was confirmed by bringing the captured property *infra præsidia*. The neutral government has no right to interpose, in order to prevent the execution of the treaty of peace in this respect, by compelling restitution to British subjects contrary to the treaty to which they are parties. The neutral government may, perhaps, require some atonement for the violation of its territory, but it has no right to require that this atonement shall include any sacrifice to the British claimant.

Mr. *Harper*, in reply, insisted, that the claim of neutral territory, as invalidating the capture, might be set up by a consul as well as any other public minister. He may be presumed to have been authorized to interpose it by his government ; and in the case of the Vrow Anna Catharina,[3] it does not appear that any proof was given to the court, that the Portuguese consul was specially instructed to make the suggestion. However partial and unjustifiable may have been the conduct of Spain in the late war, it has not yet been considered by the executive government and the legislature, (who are exclusively charged with the care of our foreign relations,) as forfeiting her right still to be considered, in courts of justice, as a neutral state. In the case of the Eliza Ann,[4] Sir W. Scott went on the ground of the | legal existence of a war between Great Britain and p. 443
Sweden, although declared by Sweden only ; and that the place where the capture was made was in the hostile possession of the British arms.

Azuni observes, ' Di fatti dacchè il nemico perseguitato si trova sotto il cannone, o nel mare territoriale della Potenza amica e neutrale, egli si considera tosto sotto l'asilo, e protezione della nazione pacifica ed amica : laonde se fosse permesso di continuare il corso fino alle spiagge neutrali, potrebbe anche continuarsi nel porto medesimo ed incendiare perfino la città ove l'inseguita nave si fosse rifugiata. Lo stesso Casaregi connobe in appresso lo sbaglio preso su di questa materia o scordò questia sua dottrina, giacchè sostenne di poi l'opinione in altro discorso posteriormente scritto da lui.' ' Aut naves inimicae (et hæc est secunda pars distinctionis principalis) reperiuntur intra Portus, vel sub præsidiis, vel arcibus maritimis alicujus principis alieni, aut in mari ita vicino, ut tela tormentave muralia maritimae arcis illuc adigi possint, tunc citra omne dubium dictae naves hostiles, eoque minus naves communis amici principis recognosci, visitari, et depraedari sub quovis praetextu minime valent, quia dictae naves non minus sunt sub custodia et protectione talis principis, quam sunt illius subditi intra civitatis muros existentes.' Optimus textus est in lege 3. § fin. ff. *De adquir. rer. dom.* Ibid. ' Quidquid autem eorum coeperimus, eo usque nostrum esse intelligitur, donec nostra custodia coercetur.' Casaregis, Disc. 174. n. 11. Ibid.

[1] The Anna, 5 *Rob.* 345.
[2] *Wheaton on Capt.* 307. and the authorities there cited.
[3] 5 *Rob.* 15. [4] *Dodson*, 244.

The observations thrown out by him in delivering his judgment, as to the necessity of the neutral state maintaining a perfect impartiality between the belligerents, in order to support a claim of this sort in the prize court, were superfluous; because the facts showed that Sweden was in no respect to be considered as neutral, having openly declared war against Great Britain, and a counter declaration being unnecessary to constitute a state of hostilities. As to the alleged resistance of the captured vessel, it was a premature defence only, commenced in consequence of apprehensions from Carthagenian rovers, which frequented those seas; and being the result of misapprehension, could confer no right to capture where none previously existed. Being in a neutral place, the vessel was entitled to the privileges of a neutral. Resistance to search does not always forfeit the privileges of neutrality; it may be excused under circumstances of misapprehension, accident, or mistake.[1] But resistance to search by a neutral on the high seas is generally unjustifiable. Here the right of search could not exist, and, consequently, an attempt to exercise it might lawfully be resisted. Finding the neutral territory no protection, the captured vessel resumed her rights as an enemy, and attempted to defend herself. The titles of possession, which are said |
p. 444 to be confirmed by a treaty of peace, are those which arise from sentences of condemnation, valid or invalid; but the principle cannot be applied to a mere tortious possession, unconfirmed by any sentence of condemnation, like the present. The capture being invalid *ab initio*, and the former proprietor being rehabilitated in his rights by the intervention of peace, may interpose his claim at any time before a final sentence of condemnation.

March 7th.

Mr. Justice STORY delivered the opinion of the court. The first question which is presented to the court is, whether the capture was made within the territorial limits of Spanish St. Domingo. The testimony of the carpenter and cook of the captured vessel distinctly asserts that the ship, at the time of the capture, was laying at anchor about a mile from the shore of the island. The testimony of the captors as distinctly asserts, that the ship then lay at a distance of from four to five miles from the shore. It is contended, by the counsel for the claimants, that captors are in no cases admissible witnesses in prize causes, being rendered incompetent by reason of their interest. It is certainly true, that, upon the original hearing, no other evidence is admissible than that of the ship's papers, and the preparatory examinations of the captured crew. But, upon an order for farther proof, where the benefit of it is allowed to the captors, their attestations are clearly admissible evidence. This is the ordinary course of prize courts, especially where it becomes material to

[1] The St. Juan Baptista, &c., 5 *Rob.* 36.

ascertain the circumstances of the capture; for in such cases the | facts p. 445
lie as much within the knowledge of the captors as the captured; and the objection of interest generally applies as strongly to the one party as to the other. It is a mistake, to suppose that the common law doctrine, as to competency, is applicable to prize proceedings. In courts of prize, no person is incompetent merely on the ground of interest. His testimony is admissible, subject to all exceptions as to its credibility. The cases cited at the argument distinctly support this position; and they are perfectly consistent with the principles by which courts of prize profess to regulate their proceedings. We are, therefore, of opinion, that the attestations of the captors are legal evidence in the case, and it remains to examine their credit. And without entering into a minute examination, in this conflict of testimony, we are of opinion, that the weight of evidence is, decidedly, that the capture was made within the territorial limits of Spanish St. Domingo.

And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign. We are of opinion, that his office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, | intrusted, by virtue of his office, with authority to represent p. 446
him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt, that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion, or proof, of any such delegation of special authority in this case; and therefore we consider this claim as asserted by an incompetent person, and on that ground it ought to be dismissed. It is admitted, that a claim by a public minister, or, in his absence, by a charge d'affaires in behalf of his sovereign would be good. But in making this admission, it is not to be understood that it can be made in a court of justice without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which this court expressly reserve their opinion, until the point shall come directly in judgment.[1]

The claim of the Spanish government for the violation of its neutral territory being thus disposed of, it is next to be considered whether the

[1] See Viveash v. Becker, 3 *Maule and Selwyn*, 284. as to the extent of the powers and privileges of consuls.

British claimant can assert any title founded upon that circumstance. By the return of peace, the claimant became rehabilitated with the capacity to sustain a suit in the courts of this country; and the argument
p. 447 is, that a capture made in a neutral territory is void; and, | therefore, the title by capture being invalid, the British owner has a right to restitution. The difficulty of this argument rests in the incorrectness of the premises. A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him and him only, is it to be considered void. The enemy has no rights whatsoever; and if the neutral sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities; and the doctrine rests on well established principles of public law.[1]

There is one other point in the case which, if all other difficulties were removed, would be decisive against the claimant. It is a fact, that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self defence. The privateer had an equal title with herself to the neutral
p. 448 protection, and was in no default in approaching the | coast without showing her national character. It was a violation of that neutrality which the captured ship was bound to observe, to commence hostilities for any purpose in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign.

The conclusion from all these views of the case is, that the ship and cargo ought to be condemned as good prize of war. And the only remaining inquiry is, whether the captors have so conducted themselves as to have forfeited the rights given by their commission, so that the condemnation ought to be to the United States. There can be no doubt, that if captors are guilty of gross misconduct, or laches, in violation of their duty, courts of prize will visit upon them the penalty of a forfeiture of the rights of prize, especially where the government chooses to interpose a claim to assert such forfeiture. Cases of gross irregularity, or fraud,

[1] The same rule is adhered to in the prize practice of France, and was acted on in the case of the *Sancta Trinita*, a Russian vessel, captured within a mile and a half of the coast of Spain; but the council of prizes refused restitution, because the Spanish government did not interpose a claim on account of its violated territory. *Bonnemant's Translation of De Habreu, tom.* I. *p.* 117.

may readily be imagined in which it would become the duty of this court to enforce this principle in its utmost rigour. But it has never been supposed that irregularities, which have arisen from mere mistake, or negligence, when they work no irreparable mischief, and are consistent with good faith, have ordinarily induced such penal consequences. There were some irregularities in this case; but there is no evidence upon the record from which we can infer that there was any fraudulent | suppression, or any gross misconduct inconsistent with good faith; p. 449 and, therefore, we are of opinion, that condemnation ought to be to the captors.

It is the unanimous opinion of the court, that the decree of the circuit court be affirmed, with costs.

Decree affirmed.

The Amiable Nancy.

(3 Wheaton, 546) 1818.

The district courts of the United States have jurisdiction of questions of prize, and its incidents, independent of the special provisions of the prize act of the 26th June, 1812, ch. 430. (CVII.)

On an illegal seizure, the original wrong-doers may be made responsible beyond the loss actually sustained, in a case of gross and wanton outrage; but the owners of the privateer, who are only constructively liable, are not bound to the extent of vindictive damages.

An item for loss by deterioration of the cargo, not occasioned by the improper conduct of the captors, rejected.

The probable or possible profits of an unfinished voyage afford no rule to estimate the damages, in a case of marine trespass.

The prime cost or value of the property lost, and, in case of injury, the diminution in value by reason of the injury, with interest thereon, affords the true measure for estimating damages in such a case.

An item for the ransom of the vessel and cargo, which had been subsequently seized by another belligerent, (as alleged for want of papers,) of which the vessel had been deprived by the first captors, rejected under the particular circumstances of the case.

This was a suit for a marine trespass, commenced in the district court for the southern district of New-York, by the libellants and appellants, who were the owner, master, supercargo, and crew of the Haytian schooner Amiable Nancy, against the defendants, who were the owners of the private armed American vessel Scourge.

The libel states, that the Amiable Nancy and her cargo belonged to the libellant, Peter Joseph Mirault, of Port-au-Prince, in the island of Hayti, or St. Domingo; | that the vessel, with a cargo of corn, sailed from Port- p. 547 au-Prince about the 7th of October, 1814, on a voyage to Bermuda, and in the prosecution thereof, about the twenty-fourth day after sailing, in latitude 25 degrees north, was obliged, by stress of weather, to bear away

for Antigua, there to refit and again proceed on the said voyage; that whilst proceeding toward Antigua, about the 4th of November, in the same year, in latitude 17 degrees 54 minutes north, and in longitude 62 degrees 42 minutes west, the said Haytian schooner was boarded by an armed boat's crew from the private armed American brig Scourge, commanded by Samuel Eames, and owned by the defendants; that Jeremy C. Dickenson, the first lieutenant of the said brig, with the said armed boat's crew, then and there took possession of the Amiable Nancy, and robbed and plundered the libellants, respectively, of divers articles of wearing apparel, money, and other valuable effects of a great value, being all that the libellants, at the time of the boarding as aforesaid, were possessed of; and also robbed and plundered the said schooner of her papers, notwithstanding that Samuel C. Lathrop, the officer commanding the marines of the aforesaid private armed brig, and who accompanied the said armed boat's crew, had reported to the said Jeremy C. Dickenson that he had examined the said papers; that they were perfectly in order, and that the said schooner was a Haytian schooner as aforesaid; that the said armed boat's crew also robbed and plundered the said schooner of divers articles belonging to her tackle and apparel, to wit, of a log reel
p. 548 and line, | lines and cordage, and, also, of poultry; and greatly ill-treated the libellants, and, in particular, knocked down and greatly bruised the libellant, Frederick Roux, and put the libellants in bodily fear and danger of their lives; that about twelve o'clock of the same night, the armed boat's crew aforesaid left the Amiable Nancy, and the said schooner was permitted to proceed on her course as aforesaid, and did so proceed, but her papers were not restored, nor any other article of apparel, money, nor any of the valuable effects of which the said schooner and libellants had been robbed and plundered, although the said captain and supercargo did frequently and urgently remonstrate with the boarding officer upon the impropriety of such conduct as aforesaid; and did then and there state, that the said schooner could not proceed without her said papers; but, notwithstanding the remonstrances of the said libellants, nothing whatever which had been taken from the said schooner, and from the libellants, was restored. That the libellant, Galien Amie, was not permitted to go on board of the said private armed brig, although he earnestly requested permission so to do, with the intent to complain to the commander of the said private armed brig, of the conduct of his said armed boat's crew, and of requesting him to cause the papers and articles taken as aforesaid, to be restored to the libellants and the said schooner. That the said schooner continued on her course as aforesaid, and on or about the morning of the 8th of November, in the year aforesaid, arrived at the entrance of the harbour of St. John's, in the island of Antigua, when
p. 549 she was seized and detained by his Britannic majesty's | guard-brig Spider,

on account of the want of her papers ; and both the vessel and cargo were, for the same reason, libelled and proceeded against in the vice admiralty prize court in the said island. That the Amiable Nancy was detained in the possession of the said guard-brig Spider until the 24th of November ; and in consequence of an agreement previously made between the captors aforesaid and the said supercargo, which he was advised to make, in order to avoid the farther detention, deterioration of the cargo, and total loss of the same, as of the said schooner, the schooner and her cargo were condemned as good and lawful prize, and were immediately delivered up to the libellant, the supercargo aforesaid, on an engagement to pay to the said captors the sum of $1,000, and all law and court charges, to a great amount, to wit, to the amount of about $542 21, which said compromise, law and court charges together, amounted to the sum of $1,542 21, which the libellant, Frederick Roux, was obliged to pay, and did actually pay, in order to procure the liberation of the said vessel and cargo. And in order to pay the same, the said last-mentioned libellant was obliged to pay, and did pay, the farther sum of $536 44, by selling bills to procure specie to make the said payment ; beside which, the said cargo of corn sustained a loss of $1,200, by its detention in port as aforesaid, deteriora tion and fall in price ; that the owner of said schooner did sustain farther loss by the breaking up of his said voyage, and the said schooner being obliged to leave Antigua in ballast, although a full freight was offered to him. That in consequence of | the robbery and plunder of the said schooner, p. 550 and the ill-treatment of the libellants, and the capture and detention, as aforesaid, heavy loss and damage accrued to the libellants, respectively, amounting in the whole to $15,000.

The libel then prays, that the defendants, as the owners of the Scourge, may be decreed to pay to the libellants the damages respectively sustained by them by the illegal conduct of the said boat's crew, with all other charges and expenses thereby incurred, and losses therefrom accruing, and for such other relief as may be suited to the case.

The defendants, by their answer and plea, admit that they were, at the time mentioned in the libel, the owners of the Scourge, which was regularly commissioned as a private armed vessel during the late war ; and that, whilst cruising on the high seas, she met with the said Haytian schooner ; but they do not admit that the plundering, outrages, and other unlawful acts mentioned in the libel, were committed as therein charged ; they do, however, admit, that the said schooner was boarded by a crew from the Scourge, under the belief that she was an enemy, and that some improper acts were committed by some of the said crew ; but they deny their responsibility therefor, especially as the said crew, or some of them, were punished for their improper conduct.

Samuel C. Lathrop, captain of marines on board the Scourge, proved,

that whilst the said vessel was on a cruise, they fell in with the Amiable Nancy, about the 4th or 5th of November, 1814, and boarded her; that
p. 551 Lieut. Dickenson and himself, with twelve | or thirteen of the crew, went in the boarding boat, under the command of Lieut. Dickenson, and that as soon as the boat came alongside of the schooner, Dickenson and himself went on board of her, and all the men but one followed; that the men immediately commenced plundering the vessel, which Dickenson saw, and took no measures to prevent; that the witness examined her papers, and found her to be a Haytian schooner, and that they were all regular, and so reported to Lieut. Dickenson. That the boat's crew ought not to have gone on board of the schooner at all; but Dickenson did not order them back, and permitted them to proceed in breaking into the cabin, breaking open the trunks of the captain and supercargo, plundering their contents, and the schooner's crew of their clothes and effects, and throwing them in bundles into the boat along side the schooner; that the captain and supercargo complained to Dickenson of the conduct of his crew, and especially of their destruction of the schooner's papers; and the supercargo also complained of being knocked down; but Dickenson took no notice of their complaints, and suffered the boat's crew to continue their plundering two hours on board of the schooner, though he had examined the schooner's papers, and made his report, as before stated, in ten minutes after going on board.

Commissions were issued to Antigua and Port-au-Prince to take testimony on the part of the libellants. Under the Antigua commission, it was proved, that the Amiable Nancy and her cargo were seized, libelled,
p. 552 and condemned at Antigua, on account of her | want of papers. That the supercargo compromised with the captors for $1,000, and court charges $542 21, which he was advised to do, as most for the interest of the owner. That it was necessary to pay this amount in specie, which could only be raised by a sale of the bills for which the cargo was sold, and was done at a loss of $536 44: that other sums were disbursed from the vessel, making in the whole $2127 60. During the detention of the vessel, the price of corn fell a dollar a bushel, and the cargo was injured by the search of the schooner, made by the Spider's crew, which occasioned a loss of $1,200. The expenses of the schooner at Antigua were proved to be $414. The value of the articles plundered from the vessel, captain, supercargo, and crew, was proved by one of the witnesses, and by the protest; also, the ill-treatment and personal violence complained of.

Under the commission to Port-au-Prince, it was proved that the libellant, Peter Joseph Mirault, was the owner of both the schooner and cargo, and that the schooner was a Haytian vessel, regularly documented as such. The detention and plunder of the schooner, by the boat's crew of the Scourge, is fully and particularly proved by one of the seamen on

board of the schooner. The object of the voyage to Bermuda, and the loss sustained in consequence of its being broken up, are also proved.

On the hearing of the cause in the district court, it was referred to the clerk, or his deputy, to associate with him two merchants, and report the damages sustained by the libellants. The deputy clerk accordingly associated with him two respectable merchants, one chosen by each of the parties, who reported the damages as follows: p. 553

Money paid for redeeming vessel and cargo, at Antigua, after condemnation,		$2,127 60	
Loss sustained on sales of the cargo of corn, at Antigua, in consequence of the capture,		1,200 00	
Detention, wages of the crew at Antigua, in consequence of seizure by the Spider brig, occasioned by the loss of ship's papers,		414 00	
Articles plundered from the schooner Amiable Nancy,		25 00	
Money and effects plundered from M. Roux, the supercargo,		470 00	
Money and effects plundered from the officers and crew of the Amiable Nancy—			
From Captain Amie,	100 00		
Moriset, mate,	80 00		
E. Lenau,	54 00		
J. J. Loiseau,	53 00		
Michael,	10 00		
Savou,	7 00		
		304 00	
			4,540 60

Loss sustained in consequence of the expenses occasioned by the seizure and condemnation in Antigua, growing out of the Amiable Nancy having been deprived of her papers by the acts of the officers and crew of the Scourge, as proved by the deposition of Samuel Dawson, and F. Lavaud, of Port-au-Prince, ... 3,500 00 p. 554

8,040 60

Interest on this sum, from 1st January, 1815, till the 1st July, 1817, at 6 per cent. per annum, ... 1,206 07

9,246 67

Allowance for M. Roux's expenses to and from Port-au-Prince, Antigua, Boston, &c.; detention in New-York, loss of time, and other incidental expenses, procuring evidence, and attending the trial, ... 1,500 00

$10,746 67

This report was confirmed by the court, and it was further ordered by the court, that the defendant should pay to the libellant, for personal injuries, as follows :

To the supercargo, five hundred dollars,	$500
To the captain, one hundred dollars,	100
To the mate, one hundred dollars,	100
To the sailor, fifty dollars,	50
	$750

p. 555 And that the defendants should pay to the libellants one thousand dollars, for the commission claimed by the supercargo, Frederick Roux, seven hundred and fifty dollars for counsel fees, the proctor's costs, and the costs of court.

The defendants appealed from the decision of the district court to the circuit court for the southern district of New-York, where it was heard in September term, 1815, and the following decree made :

This appeal having been argued, &c. this court, after mature deliberation thereon, do order, adjudge, and decree, that the sentence of the district court, which has been appealed from, be reversed, and this court proceeding to assess the damages in this cause, make the following allowances, that is to say—

To the Owner of the Schooner.

1. For expenses during her detention at Antigua, in conformity with the estimate of the consignee,	$300 00	
2. For expenses of the mate and supercargo while there, according to the testimony of the same witness,	70 00	
3. For articles plundered from schooner	25 00	
Interest on these sums at 10 per cent. from 1st of January, 1815, to 1st September, 1817, two years and eight months,	103 94	
		498 94

p. 556 *To the Master of the Schooner.*

1. For articles taken from him,	100 00	
The same interest on this sum,	26 66	
2. For personal injuries,	100 00	
		226 66

To the Supercargo.

1. For articles plundered of him,	470 00	
The like interest on this sum,	114 32	
2. For personal wrongs,	500 00	
		1084 32

3. For his expenses in collecting testimony at Antigua, Port-au-Prince &c., and attending trial, ...		750 00
To the Mate.		
1. For the property lost by him, . . .	80 00	
The like interest on this sum, ...	21 32	
2. For injury to his person, ...	100 00	
		201 32
To Lenau, the Sailor.		
1. For property robbed of him, ...	54 00	
The like interest on this sum, ...	14 40	
2. For injury to his person, ...	50 00	
		118 40
		$2879 64 |

It is therefore further ordered and directed, That there be paid by the p. 557
appellants, to the respondents and libellants, the said sum of two thousand eight hundred and seventy-nine dollars and sixty-four cents, in the manner and proportions following, that is to say—to the libellant, Peter Joseph Mirault, owner of the schooner and cargo, the sum of four hundred and ninety-eight dollars and ninety-four cents; to the libellant, Galien Amie, master of the schooner, the sum of $226 66; to the libellant, Frederick Roux, the supercargo, the sum of $1,834 32; to the libellant, Anthony Morisset, the mate, the sum of $201 32; to the libellant, Elie Lenau, one of the mariners, the sum of $118 40.

And it is further ordered, adjudged, and decreed, That the appellants pay the further sum of $750 for counsel fees in the district court; and that they also pay the proctor's costs in the said court, and the costs of that court, to be taxed.

And it is further ordered and decreed, That each party pay his own costs in this court; from which decree the libellants appealed to this court.

This cause was argued by Mr. *Sergeant* and Mr. *Baldwin*[1] for the appellants, and by Mr. *D. B. Ogden* for the respondents.[2]

March 11th.

Mr. Justice STORY delivered the opinion of the court. The jurisdiction of the district court to entertain | this suit, by virtue of its general ad- p. 558
miralty and maritime jurisdiction, and independent of the special provisions of the prize act of the 26th of June, 1812, ch. 107. has been so

[1] They cited The Lucy, 3 *Rob.* 208. The Narcissus, 4 *Rob.* 17. The Lively, 1 *Gallis.* 315.

[2] He cited Del Col *v.* Arnold, 3 *Dall.* 333.

repeatedly decided by this court, that it cannot be permitted again to be judicially brought into doubt.[1] Upon the facts disclosed in the evidence, this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honour of the country, and the duty of the court, equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the
p. 559 service, they can *scarcely ever* be able to secure to themselves | an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of opinion, that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages. While the government of the country shall choose to authorize the employment of privateers in its public wars, with the knowledge that such employment cannot be exempt from occasional irregularities and improper conduct, it cannot be the duty of courts of justice to defeat the policy of the government, by burthening the service with a responsibility beyond what justice requires, with a responsibility for unliquidated damages, resting in mere discretion, and intended to punish offenders.

As the respondents have not appealed from the decree of the circuit court, that decree, so far as it allows damages against them, is not re-examinable here. And the only inquiry will be, whether any of the items allowed by the district court, were improperly rejected by the circuit court.

And first, as to the item of 1,200 dollars, for losses sustained in the sale of the cargo at Antigua. This loss is said to have been occasioned partly by the deterioration of the corn by sea damage, the mixing of the damaged with the sound corn by the improper conduct of the crew of the Spider brig of war, and partly by a fall of the price of corn during the detention of the vessel at Antigua. We are of opinion, that this item

[1] Vide 2 Wheaton, APPENDIX, note 1. p. 5. The jurisdiction of the admiralty, as a court of prize, has been recently reviewed in England, on an application to the court of chancery for a prohibition, in which it was determined, that this jurisdiction does not depend upon the prize act or commission, nor cease with the cessation of hostilities; but that it extends to all the incidents of prize, and to an indefinite period after the termination of the war. *Ex parte* Lynch *et al.* 1 *Maddock's Rep.* 15.

was properly rejected. The injury to | the corn was in no degree attri- p. 560
butable to the improper conduct of the officers and crew of the privateer. The vessel was actually bound to Antigua at the time when she was met by the privateer, under a necessity occasioned by stress of weather, and the fall of the market there is precisely what would have arisen upon the arrival of the vessel under ordinary circumstances. Unless, therefore, the sale of the corn was compelled at Antigua, solely by the misconduct of the privateer, (which, in our opinion, was not the case,) the claim for such loss cannot be sustained.

Another item is 3,500 dollars, for the loss of the supposed profits of the voyage on which the Amiable Nancy was originally bound. In the opinion of the court, this item also was properly rejected. The probable or possible benefits of a voyage, as yet *in fieri*, can never afford a safe rule by which to estimate damages in cases of a marine trespass. There is so much uncertainty in the rule itself, so many contingencies which may vary or extinguish its application, and so many difficulties in sustaining its legal correctness, that the court cannot believe it proper to entertain it. In several cases in this court, the claim for profits has been expressly overruled; and in Del Col v. Arnold, (3 *Dall.* 333.) and The Anna Maria, (2 *Wheat. Rep.* 327.) it was, after strict consideration, held, that the prime cost, or value of the property lost, at the time of the loss, and in case of injury, the diminution in value, by reason of the injury, with interest upon such valuation, afforded the true measure for assessing damages. This rule may not secure a complete | indemnity for all possible p. 561
injuries; but it has certainty and general applicability to recommend it, and in almost all cases, will give a fair and just recompense.

The next item is 2,127 dollars and 60 cents, for the ransom of the vessel and cargo, and the payment of the costs of court. The evidence upon this head is not very satisfactory in its details. It is asserted that the vessel was seized for the want of papers, but whether as prize of war, or to enforce a municipal forfeiture, is not distinctly stated; and no copy of the proceedings of the court is produced to clear up a single doubt or obscurity. Nor does it appear, whether the compromise was made before or after the libel was filed; and it is admitted that it was made without taking the advice of counsel, upon the mere opinion of a merchant at Antigua, who supposed that a condemnation would certainly ensue. Upon what legal grounds this opinion could be reasonably entertained, it is extremely difficult to perceive. Assuming that the vessel and cargo were seized as prize of war, it cannot for a moment be admitted, that the mere want of papers could afford a just cause of condemnation. It might be a circumstance of suspicion; but explained (as it must have been) by the preparatory examinations of the officers and crew, and by the fact of a voluntary arrival, it is difficult to suppose that there could be any

judicial hesitation in immediately acquitting the property. And the farthest that any prize court could, by the utmost straining, be presumed to go, would be to order farther proof of the proprietary interest. It
p. 562 would be | the highest injustice to the British courts to suppose that the mere want of papers, under such circumstances, could draw after it the penalty of confiscation. We do not, therefore, think, that the ransom was justifiable or reasonable. The utmost extent of loss to which the owner was liable, was the payment of the costs and expenses of bringing the property to adjudication; and for such costs and expenses, as far as they were incurred and paid, the owner is now entitled to receive a recompense. In this respect, the decree of the circuit court ought to be amended.

The item for the supercargo's commission was also properly rejected. It does not appear, with certainty, to what sum he was entitled; and under the circumstances, if lost, (which is not satisfactorily shown,) the commissions were not lost by any act for which the respondents were liable. The sum allowed for the travel, attendence, and expenses of the supercargo in procuring testimony, by the circuit court is, in our judgment, an adequate compensation.

The sum of 44 dollars was (probably by mistake) deducted by the circuit court from the expenses at Antigua. This sum is to be reinstated.

To the decree of the circuit court there are, consequently, to be added the following sums, viz.

For expenses and costs of court at Antigua, 542 dollars, 21 cents.

The loss on the exchange to pay that sum, (say) 188 dollars.

The short allowance of expenses, 44 dollars.

In the whole, amounting to the sum of 774 dollars 21 cents, on which
p. 563 interest, at the rate of 6 per | cent., is to be allowed from the time of payment up to the time of this judgment. And the decree of the circuit court is to be reformed accordingly.

Decree reformed.

The United States v. Palmer et al.

(3 Wheaton, 610) 1818.

A robbery committed on the high seas, although such robbery if committed on land would not by the laws of the United States be punishable with death, is *piracy*, under the 8th section of the act of 1790, ch. 36. (ix) for the punishment of certain crimes against the United States; and the circuit courts have jurisdiction thereof.

The crime of *robbery*, as mentioned in the act, is the crime of robbery as recognised and defined at common law.

The crime of robbery committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, is not piracy under the act, and is not punishable in the courts of the United States.

When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States.

If that government remains neutral, but recognises the existence of a civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorises, and which the new government may direct against its enemy.

The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of such newly erected government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal.

THIS case was certified from the circuit court for the Massachusetts district. |

At the circuit court of the United States, for the first circuit, begun p. 611
and holden at Boston, within and for the Massachusetts district, on Wednesday, the fifteenth day of October, in the year of our lord one thousand eight hundred and seventeen:

Before the honourable Joseph Story, associate justice, and John Davis, district judge.

The jurors of the United States of America within and for the district aforesaid, upon their oaths, do present, that John Palmer and Thomas Wilson, both late of Boston, in the district aforesaid, mariners, and Barney Calloghan, late of Newburyport, in the aforesaid district, mariner, with force and arms, upon the high seas, out of the jurisdiction of any particular state, on the fourth day of July now last past, did piratically and feloniously set upon, board, break, and enter a certain ship called the Industria Raffaelli, then and there being a ship of certain persons (to the jurors aforesaid unknown,) and then and there, piratically and feloniously, did make an assault in and upon certain persons, being mariners, subjects of the king of Spain, whose names to the jurors aforesaid are unknown, in the same ship, in the peace of God, and of the said United States of America, then and there being, and then and there piratically and feloniously did put the aforesaid persons, mariners of the same ship, in the ship aforesaid then being, in corporal fear and danger of their lives, then and there, in the ship aforesaid, upon the high seas aforesaid, and out of the jurisdiction of any particular state, as aforesaid, and piratically and feloniously did, then and there, steal, take, and carry away | five hundred p. 612
boxes of sugar, of the value of twenty thousand dollars of lawful money of the said United States; sixty pipes of rum, of the value of six thousand

dollars; two hundred demijohns of honey, of the value of one thousand dollars; one thousand hides, of the value of three thousand dollars; ten hogsheads of coffee, of the value of two thousand dollars; and four bags of silver and gold, of the value of sixty thousand dollars, of the like lawful money of the said United States of America, the goods and chattels of certain persons, (to the jurors aforesaid unknown,) then and there, upon the high seas aforesaid, and out of the jurisdiction of any particular state, being found in the aforesaid ship, in custody and possession of the said mariners in the said ship, from the said mariners of the same ship, and from their custody and possession, then and there, upon the high seas aforesaid, out of the jurisdiction of any particular state, as aforesaid; against the peace and dignity of the said United States, and the form of the statute of the United States, in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do farther present, that the aforesaid district of Massachusetts is the district where the offenders aforesaid were first apprehended for the said offence.

To which indictment the prisoners pleaded not guilty, and upon the trial the following questions occurred, upon which the opinions of the said judges of the circuit court were opposed.

1st. Whether a robbery committed upon the high seas, although such robbery, if committed upon land, would not, by the laws of the United
p. 613 States, be punishable | with death, is piracy under the eighth section of the act of congress, passed the thirtieth of April, A.D. 1790; and whether the circuit court of the United States hath authority to take cognisance of, try, and punish such offence?

2d. Whether the crime of robbery, mentioned in the said eighth section of the act of congress aforesaid, is the crime of robbery, as recognized and defined at common law, or is dispunishable until it is defined and expressly punished by some act of congress, other than the act of congress above mentioned?

3d. Whether the crime of robbery, committed by persons who are not citizens of the United States, on the high seas, on board of any ship or vessel, belonging exclusively to the subjects of any foreign state or sovereignty, or upon the person of any subject of any foreign state or sovereignty, not on board of any ship or vessel belonging to any citizen or citizens of the United States, be a robbery or piracy, within the true intent and meaning of the said eighth section of the act of congress aforesaid, and of which the circuit court of the United States hath cognisance, to hear, try, determine, and punish the same?

4th. Whether the crime of robbery committed on the high seas, by citizens of the United States, on board of any ship or vessel not belonging to the United States, or to any citizens of the United States, in whole or in part, but owned by, and exclusively belonging to, the subjects of

a foreign state or sovereignty, or committed on the high seas, on the person of any subject of any foreign state or sovereignty, who is not, at the time, on board of any | ship or vessel, belonging in whole or part to the United p. 614
States, or to any citizen thereof, be a robbery or piracy within the said eighth section of the act of congress aforesaid, and of which the circuit court of the United States hath cognisance to hear, try, and determine, and punish the same?

5th. Whether any revolted colony, district, or people, which have thrown off their allegiance to their mother country, but have never been acknowledged by the United States, as a sovereign or independent nation or power, have authority to issue commissions to make captures on the high seas of the persons, property and vessels of the subjects of the mother country, who retain their allegiance; and whether the captures made under such commissions are, as to the United States, to be deemed lawful; and whether the forcible seizure, with violence, and by putting in fear of the persons on board of the vessels, the property of the subjects of such mother country, who retain their allegiance, on the high seas, in virtue of such commissions, is not to be deemed a robbery or piracy within the said eighth section of the act of congress aforesaid?

6th. Whether an act, which would be deemed a robbery on the high seas, if done without a lawful commission, is protected from being considered as a robbery on the high seas, when the same act is done under a commission, or the colour of a commission from any foreign colony, district, or people, which have revolted from their native allegiance, and have declared themselves independent and sovereign, and | have assumed p. 615
to exercise the powers and authorities of an independent and sovereign government, but have never been acknowledged, or recognized, as an independent or sovereign government, or nation, by the United States, or by any other foreign state, prince, or sovereignty?

7th. Whether the existence of a commission to make captures, where it is set up as a defence to an indictment for piracy, must be proved by the production of the original commission, or of a certified copy thereof from the proper department of the foreign state or sovereignty by whom it is granted; or if not, whether the impossibility of producing either the original or such certified copy must not be proved, before any inferior and secondary evidence of the existence of such commission is to be allowed, on the trial of such indictment before any court of the United States?

8th. Whether a seal, purporting to be the seal of a foreign state or sovereignty, and annexed to any such commission or a certified copy thereof, is to be admitted in a court of the United States as proving itself, without any other proof of its genuineness, so as to establish the legal existence of such commission from such foreign state or sovereignty?

9th. Whether a seal, annexed to any such commission, purporting to be the public seal used by the persons exercising the powers of government in any foreign colony, district, or people, which have revolted from their native allegiance, and have declared themselves independent and sovereign,
p. 616 and actually exercise the powers of an independent government | or nation, but have never been acknowledged as such independent government or nation by the United States, is admissible in a court of the United States as proof of the legal existence of such commission, with or without farther proof of the genuineness of such seal ?

10th. Whether any colony, district, or people, who have revolted from their native allegiance, and have assumed upon themselves the exercise of independent and sovereign power, can be deemed, in any court of the United States, an independent or sovereign nation, or government, until they have been acknowledged as such by the government of the United States ; and whether such acknowledgment can be proved in a court of the United States, otherwise than by some act, or statute, or resolution, of the congress of the United States, or by some public proclamation, or other public act of the executive authority of the United States, directly containing or announcing such acknowledgment, or by publicly receiving and acknowledging an ambassador, or other public minister, from such colony, district, or people ; and whether such acknowledgment can be proved by mere inference from the private acts or private instructions of the executive of the United States, when no public acknowledgment has ever been made ; and whether the courts of the United States are bound judicially to take notice of the existing relations of the United States, as to foreign states and sovereignties, their colonies, and dependencies ?

11th. Whether, in case of a civil war between a mother country and its colony, the subjects of the different parties are to be deemed, in
p. 617 respect to neutral | nations, as enemies to each other, entitled to the rights of war ; and that captures made of each other's ships and other property on the high seas are to be considered, in respect to neutral nations as rightful, so that courts of law of neutral nations are not authorized to deem such acts as piracy ?

And the said judges, being so opposed in opinion upon the questions aforesaid, the same were then and there, at the request of the district attorney for the United States, stated, under the direction of the judges, and ordered by the court to be certified under the seal of the court to the supreme court, at their next session to be held thereafter, to be finally decided by said supreme court ; and the court being farther of opinion, that farther proceedings could not be had in said cause without prejudice to the merits of the same cause, did order, that the jury impannelled as aforesaid to try said cause, be discharged from giving any verdict therein.

March 13th.

Mr. *Blake*, for the United States, argued, 1. That a robbery committed on the high seas, is piracy, under the 8th section of the act of 1790, ch. 36, ' for the punishment of certain crimes against the United States,' although no law of the United States be subsisting for the punishment of the same offence if committed on land; and that such piracy is cognisable in the circuit court. The words of the statute are, ' That if any person or persons shall commit, upon the high seas,' &c. ' murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable | with death;' &c. ' every such p. 618
offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death,' &c. The relative pronoun ' *which* ' does not relate back to the first specified offences of ' murder or robbery,' but refers only to its immediate antecedent, ' any other offence.' It is this last class of crimes only that must be punishable, by the laws of the United States, with death, if committed within the body of a county, in order to constitute them piracies, when committed on the high seas. It is a mistaken principle commonly applied to penal statutes, that they are to be construed *strictly*. Sir William Jones has laid down the true rule, that criminal laws are to be construed liberally as to the offence, and strictly as to the offender.[1] A strong illustration of the good sense of this rule, is to be found in the construction which has been given in England to the *Stabbing Act*.[2] A contrary construction of the statute now under consideration, would render it wholly inoperative, until there shall be a law of the United States, for the punishment of robbery committed in the body of a county; which will never happen, as the United States have no constitutional authority to punish a robbery committed within the body of a county. Forts, arsenals, dock-yards, &c. ' under the sole and exclusive jurisdiction of the United States,' cannot be said to be within the body of a county. It may be admitted that there is some degree of looseness in the phraseology | of this section, which was evidently p. 619
copied from the British statute of the 39 Geo. III. ch. 37. relative to the same subject, without regarding the difference between the constitutions of the two countries. On the construction of the British statute, it would be perfectly immaterial whether the pronoun ' *which* ' was carried back to the words ' murder and robbery,' or whether it was confined to its immediate antecedent; because, in England, murder and robbery are punishable with death, when committed in the body of a county, under the same laws which constitute them piracies when committed on the high seas. But such a construction of our statute would render it wholly inoperative as to the great offences of murder and robbery, which are not, and cannot be made punishable under the laws of the United States, when

[1] *Life of Sir W. Jones*, p. 268. [2] *Foster's Crown Law*, 297.

committed within the body of a county. Nor can it be objected, that by the construction now contended for, the words 'any other offence' would be equally inoperative; because there are various offences which would still be reached by the statute, such as treason, &c. for the punishment of which Congress may provide, though committed within the body of a county. It follows, as a corollary, that the circuit court has cognisance of these offences; for, by the judiciary act of 1789, ch. 20. s. 11. it has cognisance of '*all* crimes and offences cognisable *under the authority of the United States.*'—2. The crime of robbery mentioned in the 8th section of the act of 1790, is the crime of robbery as understood at common law. A piracy or felony on the high seas is sufficiently defined, by terming it
p. 620 a robbery committed on the high seas. | The import of the term 'robbery,' must be sought in the common law, in the same manner as the import of the terms *murder, manslaughter, rescous, benefit of clergy,* and many others that are used in the criminal code of the United States.—3. If the *robbery* in question amount to *piracy,* by the law of nations, the words 'any person or persons,' in the 8th section, will embrace the subjects of all nations, who may commit that offence on the high seas, whether on board a foreign vessel, or a vessel belonging to citizens of the United States. A felony, which is made a piracy by municipal statutes, and was not such by the law of nations, cannot be tried by the courts of the United States, if committed by a foreigner on board a foreign vessel, on the high seas; because the jurisdiction of the United States, beyond their own territorial limits, only extends to the punishment of crimes which are piracy by the law of nations. But it is the right and the duty of the United States, as a member of the community of nations, to punish offences committed on the high seas against the law of nations.[1] By this statute, congress have exercised this power, which is also conferred on them by the constitution. The offence of piracy, which is imperfectly defined by the law of nations, is declared to be murder or robbery committed on the high seas, or in any river, &c. out of the jurisdiction of any particular state; and is made punishable with death. Congress cannot be presumed to have neglected so important a duty as that of defining and punishing the offence of
p. 621 general piracy. | Without this statute, there can be found no definition and punishment of it; because the law of nations merely creates the offence, and the common law and statute 28 Henry VIII. ch. 15. may perhaps not be considered as in force in the United States.—4. The crime of robbery committed by a citizen of the United States on the high seas, on board a foreign vessel, or on the person of a foreigner, must be considered as a piracy, under the 8th section of the act; because the jurisdiction of a nation extends to its citizens, wheresoever they may be, except within the territory of a foreign sovereign.[2] The jurisdiction of a nation

[1] 4 *Bl. Com.* 71. [2] 2 *Rutherforth's Inst.* 180. *Vattel, L.* 2. *ch.* 6.

over its public ships is exclusive every where; but it is not exclusive over merchant vessels belonging to its subjects. It is there concurrent with the personal jurisdiction of other nations over their citizens. Consequently the personal jurisdiction of the United States over their citizens extends to offences committed by them on board of foreign merchant vessels on the high seas.—5. The general principle applied by the writers on the law of nations to the case of a civil war, considers the war, (as between the conflicting parties,) as just on both sides, and that each is to treat the other as a public enemy, according to the established usages of war.[1] So, also, it is the duty of other nations to remain neutral, and not to interfere with the exercise of complete belligerent rights by both parties within the territory which is the scene of their hostilities. But this does not imply a | right on their part to push their wars on to the ocean, and to p. 622
annoy the rest of the world on this common highway of nations. The generality of the expressions used by Vattel on this subject may, indeed, seem to import such a right. But it should be remembered that, with all his merit, he is very deficient in precision, and on this question peculiarly unsatisfactory. The maritime rights of a belligerent power must be perfect, or they cannot exist at all. They must, therefore, include the right of visitation and search, and of detaining for adjudication; and of punishing a resistance to the exercise of these rights by the appropriate penalty of confiscation. So that neutral nations may come to be affected in their most valuable interests by a mere domestic quarrel, which never ought to have been extended beyond the territory of the people where it originated. This renders it indispensable to inquire how far neutral nations are bound to submit to the exercise of these high prerogatives of sovereignty in a civil war, under colour of a commission from one of the belligerent parties, whose independence has not been acknowledged by any power. The right of an insurgent people to be treated by the parent state, against which it revolts, with all the humanity and moderation which are required in any other war, and the duty of neutral nations to abstain from interfering in the contest, are not denied. But the right of the new people to thrust themselves into the family of nations, and to make the ocean the theatre of their predatory hostilities, without the consent of other nations, is denied. Such a right can only be founded | upon a perfect title to sovereignty, which cannot exist in a case where p. 623
the very object of the war is to decide whether the claim of the former sovereign, or of the revolted people shall prevail. This title cannot be taken notice of by courts of justice until it has been recognized by the government of the country under whose authority they sit.[2]—6. If, then, a revolted colony or people, whose independence has not been recognized

[1] *Vattel, L. 3. ch. 18. s. 296.*
[2] Rose *v.* Himely, 4 *Cranch*, 292. Gelston *v.* Hoyt, 3 *Wheaton*, p. 324.

by the government of the United States, have no authority to issue a commission to make captures on the high seas, which can be considered as valid in the courts of the United States, a capture under such a commission is, in no respect, distinguishable from a capture without any commission. A privateer cruizing under two commissions from different sovereigns is a pirate.[1] In the case of the famous pirate Kydd,[2] the indictment was for general piracy. He had two commissions, one against the French, the other against certain pirates, which he produced in his justification. But Lord Chief Baron Ward said, 'If he had acted pursuant to his commission, he ought to have condemned ship and goods, if they were French; but by his not condemning, he seems to show his *aim*, *mind*, and *intention*, and that he did not act in that case by virtue of his commission, but quite contrary to it.
p. 624 Whilst | men pursue their commissions, they must be justified; but when they do things not authorized, or never intended by them, it is as if they had no commission.' This principle, that where the criminal intention is apparent, the quality of the act will not be changed by its having been committed under colour of legal authority, is illustrated by all the analogies of criminal law.[3]—7. The established rules of evidence ought not to be dispensed with in the proof of an authority to capture, where that authority is set up as a defence to an indictment for piracy. All civilized nations have departments and offices, in which the commissions issued to their cruizers are registered; the original is borne about with him by the cruizer as his authority to search, to detain, and to capture; a copy of it may always be readily obtained by application at the proper office. The impossibility of producing the original, or an examined copy of such a commission, is, therefore, an inadmissible supposition. The rule of evidence which requires that it should be produced is inflexible, and is founded upon the reasonable suspicion, excited by a resort to inferior testimony, that there must be some fatal defect in the original documents.—8. There can be no doubt that the seal of a recognized foreign state or sovereignty, is to be admitted as proving itself, without other proof of its genuineness. But the seal of a new people, or state, is not sufficiently notorious to prove itself, and to give credit to it would be to recognize the sovereign from whom it emanates, which
p. 625 courts of justice are not | competent to do.—9. The ninth question certified from the court below has been already answered.—10. The first branch of the tenth question has been before answered by this court in the cases already cited.[4] The second branch of this question pre-supposes that no

[1] 2 *Sir L. Jenkins' Life*, 714. *Ord. de la Mar. L.* 3. *t.* 9. *art.* 3. *Martens on Privateers*, 44.

[2] 5 *State Trials*, 314.

[3] 2 *East's Crown Law*, 660. *Forster*, 135. 154. 312.

[4] Rose *v.* Himely, 4 *Cranch*, 292. Gelston *v.* Hoyt, 3 *Wheaton*, p. 324.

distinct acknowledgment of the new state has been made by the United States, since it excludes from consideration any public act of recognition by the legislative and executive departments, and confines itself to the mere private acts and instructions of the executive. On a subject of such importance as a change in the foreign relations of the country, nothing but the most explicit, public, and notorious acts of the government should be noticed by courts of justice. Nothing should be left to inference and conjecture; because, such a course might lead to a usurpation by the courts of the high prerogative of making war and peace, and the whole nation would become responsible to other nations for the error of judgment in a department with which it had not entrusted the care of its foreign affairs. In the infinite variety and complication of these affairs, the language and conduct of the executive may be misunderstood; and, therefore, nothing short of an act of the whole legislature, a treaty, a proclamation of the president, or the public reception of an ambassador from the new state, ought to be considered as a recognition of its independence.—11. The eleventh | question is involved in the discussion of the p. 626
preceding.

No counsel appeared to argue the cause for the prisoners.

March 14th.

Mr. Chief Justice MARSHALL delivered the opinion of the court. In this case, a series of questions has been proposed by the circuit court of the United States, for the district of Massachusetts, on which the judges of that court were divided in opinion. The questions occurred on the trial of John Palmer, Thomas Wilson, and Barney Calloghan, who were indicted for piracy committed on the high seas.

The first four questions, relate to the construction of the 8th section of the 'act for the punishment of certain crimes against the United States.'

The remaining seven questions, respect the rights of a colony or other portion of an established empire, which has proclaimed itself an independent nation, and is asserting and maintaining its claim to independence by arms.

The 8th section of the act on which these prisoners were indicted is in these words: 'And be it enacted, that if any person or persons shall commit, upon the high seas, or in any river, haven, bason, or bay, out of the jurisdiction of any particular state, murder, or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or | merchandize, to the value p. 627
of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby

to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be, a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.'

Robbery committed on land, not being punishable by the laws of the United States with death, it is doubted whether it is made piracy by this act, when committed on the high seas. The argument is understood to be, that congress did not intend to make that a capital offence on the high seas, which is not a capital offence on land. That only such murder, and such robbery, and such other offence as, if committed within the body of a county, would, by the laws of the United States, be punishable with death, is made piracy. That the word 'other' is without use or meaning, if this construction be rejected. That it so connects murder and robbery with the following member of the sentence, as to limit the words murder and robbery to that description of those offences which might be made punishable with death, if committed on land. That in consequence of this word, the relative 'which' has for its antecedent the whole preceding part of the sentence, and not the words 'other offences.' That section | p. 628 consists of three distinct classes of piracy. The first, of offences, which if committed within the body of a county, would be punishable with death. The second and third, of particular offences which are enumerated.

This argument is entitled to great respect on every account; and to the more, because, in expounding a law which inflicts capital punishment, no over rigid construction ought to be admitted. But the court cannot assent to its correctness.

The legislature having specified murder and robbery particularly, are understood to indicate clearly the intention that those offences shall amount to piracy; there could be no other motive for specifying them. The subsequent words do not appear to be employed for the purpose of limiting piratical murder and robbery, to that description of those offences which is punishable with death, if committed on land, but for the purpose of adding other offences, should there be any, which were not particularly recited, and which were rendered capital by the laws of the United States, if committed within the body of a county. Had the intention of congress been to render the crime of piracy dependent on the punishment affixed to the same offence, if committed on land, this intention must have been expressed in very different terms from those which have been selected. Instead of enumerating murder and robbery as crimes which should constitute piracy, and then proceeding to use a general term, comprehending other offences, the language of the legislature would have been, that

'*any offence*' committed on the high seas, which, if | committed in the p. 629
body of a county, would be punishable with death, should amount to piracy.

The particular crimes enumerated were undoubtedly first in the mind of congress. No other motive for the enumeration can be assigned. Yet, on the construction contended for, robbery on the high seas would escape unpunished. It is not pretended that the words of the legislature ought to be strained beyond their natural meaning, for the purpose of embracing a crime which would otherwise escape with impunity; but when the words of a statute, in their most obvious sense, comprehend an offence, which offence is apparently placed by the legislature in the highest class of crimes, it furnishes an additional motive for rejecting a construction, narrowing the plain meaning of the words, that such construction would leave the crime entirely unpunished.

The correctness of this exposition of the 8th section is confirmed by those which follow.

The 9th, punishes those citizens of the United States who commit the offences described in the 8th, under colour of a commission or authority derived from a foreign state. Here robbery is again particularly specified.

The 10th section extends the punishment of death to accessories before the fact. They are described to be those who aid, assist, advise, &c. &c. any person to 'commit any murder, *robbery*, or other piracy aforesaid.' If the word 'aforesaid' be connected with 'murder' and 'robbery,' as well as with 'other piracy,' yet it seems difficult to resist the | conviction that the legislature considered murder and robbery as p. 630
acts of piracy.

The 11th section punishes accessories after the fact. They are those who, 'after any murder, felony, *robbery*, or other piracy whatsoever, aforesaid, 'shall have been committed, shall furnish aid to those by whom the crime has been perpetrated. Can it be doubted, that the legislature considered murder, felony, and robbery, committed on the high seas, as piracies?

If it be answered, that although this opinion was entertained, yet, if the legislature was mistaken, those whose duty it is to construe the law, must not yield to that mistake; we say, that when the legislature manifests this clear understanding of its own intention, which intention consists with its words, courts are bound by it.

Of the meaning of the term robbery, as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law.

The question, whether this act extends farther than to American citizens, or to persons on board American vessels, or to offences committed against citizens of the United States, is not without its difficulties.

The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.
p. 631 The only | question is, has the legislature enacted such a law? Do the words of the act authorize the courts of the union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them?

The words of the section are in terms of unlimited extent. The words 'any person or persons,' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them. Did the legislature intend to apply these words to the subjects of a foreign power, who in a foreign ship may commit murder or robbery on the high seas?

The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is, 'an act for the punishment of certain crimes against the United States.' It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish.

The act proceeds upon this idea, and uses general terms in this limited sense. In describing those who may commit misprision of treason or felony, the words used are 'any person or persons;' yet these words are necessarily confined to any person or persons owing permanent or temporary allegiance to the United States.

The 8th section also commences with the words 'any person or
p. 632 persons'. But these words must be | limited in some degree, and the intent of the legislature will determine the extent of this limitation. For this intent we must examine the law. The succeeding member of the sentence commences with the words, 'if any captain or mariner of any ship or other vessel, shall piratically run away with such ship or vessel, or any goods or merchandize, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate.'

The words 'any captain, or mariner of any ship or other vessel,' comprehend all captains and mariners, as entirely as the words 'any person or persons,' comprehend the whole human race. Yet it would be difficult to believe that the legislature intended to punish the captain or mariner of a foreign ship, who should run away with such ship, and dispose of her in a foreign port, or who should steal any goods from such ship to the value of fifty dollars, or who should deliver her up to a pirate when he might have defended her, or even according to previous arrangement. The third member of the sentence also begins with the

general words ' any seaman.' But it cannot be supposed that the legislature intended to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government, who should lay violent hands upon his commander, or make a revolt in the ship. These are offences against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are. Every nation provides for such offences the punishment its own policy may dictate ; and no general words of a statute ought to | be construed to p. 633
embrace them when committed by foreigners against a foreign government.

That the general words of the two latter members of this sentence are to be restricted to offences committed on board the vessels of the United States, furnishes strong reason for believing that the legislature intended to impose the same restriction on the general words used in the first member of that sentence.

This construction derives aid from the 10th section of the act. That section declares, that ' *any person* ' who shall ' knowingly and wittingly aid and assist, procure, command, counsel, or advise, any person or persons, to do or commit any murder or robbery, &c.' shall be an accessory before the fact, and, on conviction, shall suffer death.

It will scarcely be denied that the words ' any person,' when applied to aiding or advising a fact, are as extensive as the same words when applied to the commission of that fact. Can it be believed that the legislature intended to punish with death the subject of a foreign prince, who, within the dominions of that prince, should advise a person, about to sail in the ship of his sovereign, to commit murder or robbery ? If the advice is not a crime within the law, neither is the fact advised a crime within the law.

The opinion formed by the court on this subject might be still farther illustrated by animadversions on other sections of the act. But it would be tedious, and is thought unnecessary.

The court is of opinion that the crime of robbery, committed by a person on the high seas, on board of | any ship or vessel belonging p. 634
exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States.

This opinion will probably decide the case to which it is intended to apply.

Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult.

As it is understood that the construction which has been given to the act of congress, will render a particular answer to them unnecessary, the court will only observe, that such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new state absolutely—or may make a limited recognition of it. The proceeding in courts must depend
p. 635 so entirely on the course of the government, | that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the government remains neutral, and recognises the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arrange the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department.

It follows as a consequence, from this view of the subject, that persons or vessels employed in the service of a self-declared government, thus acknowledged to be maintaining its separate existence by war, must be permitted to prove the fact of their being actually employed in such service, by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of an acknowledged state. The seal of such unacknowledged government cannot be permitted to prove itself; but it may be proved by such testimony as the nature of the case admits; and the fact that such vessel or person is so employed may be proved without proving the seal.

Mr. Justice JOHNSON. The first of these questions arises on the construction of the first division of the 8th section of the act for the punishment of certain crimes. |

p. 636 That act comprises two classes of cases, the second of which may again be subdivided into two divisions. In the second class of cases, each crime is specifically described in the ordinary mode of defining crimes, and so far the constitutional power of defining and punishing piracies and felonies on the high seas, is strictly complied with. But, with regard to the first class of cases, the legislature refers for a definition to other sources—to information not to be found in that section itself. The words are these: ' If any person shall commit, upon the high seas, &c.

murder or robbery, or any other offence, which, if committed in the body of a county, would, by the laws of the United States, be punishable with death, &c. such person shall, upon conviction thereof, suffer death.' Thus referring to the common law definition of murder and robbery alone, or to the common law definition of murder and robbery with the superadded statutory requisite of being made punishable with death, if committed on land, in order to define the offence which, under that section, is made capitally punishable.

The crime of robbery is the offence charged in this indictment, and the question is, whether it must not be shown that it must have been made punishable with death, if committed on land, in order to subject the offender to that punishment, if committed on the high seas. And singular as it may appear, it really is the fact in this case, that these men's lives may depend upon a comma more or less, or upon the question whether a relative, which may take in three antecedents just as well as one, shall be confined to one | alone. Upon such a question I here solemnly p. 637
declare, that I never will consent to take the life of any man in obedience to any court; and if ever forced to choose between obeying this court, on such a point, or resigning my commission, I would not hesitate adopting the latter alternative.

But to my mind it is obvious, that both the intent of the legislator, and the construction of the words, are in favour of the prisoners. This, however, is more than I need contend for, since a doubt relative to that construction or intent ought to be as effectual in their favour, as the most thorough conviction.

When the intent of the legislature is looked into, it is as obvious as the light, and requires as little reasoning to prove its existence, that the object proposed was, with regard to crimes which may be committed either on the sea or land, to produce an uniformity in the punishment, so that where death was inflicted in the one case, it should be inflicted in another. And congress certainly legislated under the idea, that the punishment of death had been previously enacted for the crime of robbery on land, as it had in fact been for murder, and some other crimes. And in my opinion, this intent ought to govern the grammatical construction, and make the relative to refer to all three of the antecedents, *murder*, *robbery*, and other *crimes*, instead of being confined to the last alone. That it may be so applied consistently with grammatical correctness, no one can deny; and if so, *in favorem vitæ*, we are, in my opinion, legally bound to give it that construction. Again; there is no reason to think that the word *other* is altogether a supernumerary | member of the p. 638
sentence. To give the construction contended for in behalf of the United States, that word must be rendered useless and inoperative: the sentence has the same meaning with or without it. But if we retain it, and sub-

stitute its definition, or examine its effect upon the meaning of the terms associated with it, we then have the following results: *other* is commonly defined to mean *not the same*, or (what is certainly synonymous,) *not before* mentioned. With this expression, the sentence would read thus: 'murder, or robbery, or any offence not before mentioned,' for which the punishment of death is by law inflicted. And as the use of the comma is exceedingly arbitrary and indefinite, by expunging all the commas from the sentence the meaning becomes still more obvious. Or, if instead of substituting the words not before mentioned, we introduce the single term *unenumerated*, in the sense of which the term *other* is unquestionably used by the legislature, the conclusion becomes irresistible in favour of the prisoners. There is another view of this subject that leads to the same conclusion: by supplying an obvious elision, the same meaning is given to this section. The word *other* is responded to by *than*, and the repetition of the excluded words is understood. Thus, in the case before us, by supplying the elision, we make 'murder, robbery, or any crime other than murder or robbery,' made punishable, &c. the signification of which words, had they been used, would have left no doubt.

There are several inconsistencies growing out of a construction
p. 639 unfavourable to the prisoners, which | merit the most serious consideration. The first is, the most sanguinary character that it gives to this law in its operation; for it is literally true, that under it a whole ship's crew may be consigned to the gallows, for robbing a vessel of a single chicken, even although a robbery committed on land for thousands, may not have been made punishable beyond whipping or confinement. If natural reason is not to be consulted on this point, at least the mild and benignant spirit of the laws of the United States merit attention. With regard to the mail, this inconsistency actually may occur under existing laws, should the mail ever again be carried by water, as it has been formerly. This cannot be consistent with the intention of the legislature.

But, it is contended, if congress had not intended to make murder and robbery punishable with death, independently of the circumstance of those offences being so made punishable when committed on land, they would have omitted those specified crimes altogether from this section, and have enacted generally, that all crimes made punishable with death on land should be punished with death if committed on the seas, without enumerating murder and robbery. This is fair reasoning; and in any case but one of life and death, it might have some weight. But in no case very great weight; because, in that respect, a legislature is subject to no laws in the selection of the course to be pursued. In this case, the obvious fact is, that they commenced enumerating, and

fearing some omission of crimes then supposed subject by law to death, these | general descriptive words are resorted to. But every other crime p. 640
that this division of the section comprises was punishable with death, both those which precede robbery in the enumeration, and those which come after. Robbery, except in case of the mail, stands alone; and, no doubt, was introduced under the idea, that that also had the same punishment attached to it. If it had not, in fact, then it was not the case on which the legislature intended to act; and according to my views of the grammatical or philological construction of the sentence, it is one on which they have not acted. This construction derives considerable force, also, from the consideration that this act is framed on the model of the British statute, which avowedly had this uniformity for its object.

The second question proposed in this case is one on which, I presume, there can be no doubt. For the definition of robbery under this act we must look for the definition of the term in the common law, or we will find it no where; and, according to my construction, superadd to that definition the circumstance of its being made punishable with death, under the laws of the United States, if committed on land, and you have described the offence made punishable under this section.

There are eleven questions certified from the circuit court of Massachusetts; but of those eleven, these two only appear to me to arise out of the case. The transcript contains nothing but the indictment and impannelling of the jury. No motion; no evidence; no demurrer *ore tenus*, or case stated, appears upon the transcript, on which the remaining questions could | arise. On the indictment the two first p. 641
questions might well have been raised by the court themselves, as of counsel for the prisoners; but as far as appears to this court, all the other questions might as well have been raised in any other case. I here enter my protest against having these general questions adjourned to this court. We are constituted to decide causes, and not to discuss themes, or digest systems. It is true, the words of the act, respecting division of opinion in the circuit court, are general; but independently of the consideration that it was not to be expected that the court could be divided, unless upon questions arising out of some cause depending, the words in the first proviso, 'that the cause may be proceeded in,' plainly show that the questions contemplated in the act are questions arising in a cause depending; and if so, it ought to be shown that they do arise in the cause, and are not merely hypothetical. In the case of Martin v. Hunter,[1] this court expressly acted upon this principle, when it went into a consideration of the question, whether any estate existed in the plaintiff in error, before it would consider the question on the construction of the treaty, as applicable to that estate.

[1] 7 *Cranch*, 603. 3 *Wheaton*, vol. 1, p. 304.

If, however, it becomes necessary to consider the other questions in this case, I will lay down a few general principles, which, I believe, will answer all: 1. Congress can inflict punishment on offences committed on board the vessels of the United States, or by citizens of the United States, any where; but congress cannot make that piracy which is not
p. 642 piracy by | the law of nations, in order to give jurisdiction to its own courts over such offences.

2. When open war exists between a nation and its subjects, the subjects of the revolted country are no more liable to be punished as pirates, than the subjects who adhere to their allegiance; and whatever immunity the law of nations gives to the ship, it extends to all who serve on board of her, excepting only the responsibility of individuals to the laws of their respective countries.

3. The proof of a commission is not necessary to exempt an individual serving on board a ship engaged in the war, because any ship of a belligerent may capture an enemy; and whether acting under a commission or not, is an immaterial question as to third persons: he must answer that to his own government. It is only necessary to prove two facts: 1st. The existence of open war. 2dly. That the vessel is really documented, owned, and commanded as a belligerent vessel, and not affectedly so for piratical purposes.

4. For proof of property and documents, it is not to be expected that any better evidence can be produced than the seal of the revolted country, with such reasonable evidence as the case may admit of, to prove it to be known as such; and a seal once proved, or admitted to a court, ought afterwards to be acknowledged by the court officially, at least, as against the party who has once acknowledged it.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the circuit court of the United States, for the district of
p. 643 Massachusetts, | and on the questions on which the judges of that court were divided; and was argued by counsel on the part of the United States. On consideration whereof, this court is of opinion, that a robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is piracy under the eighth section of the act entitled, 'an act for the punishment of certain crimes against the United States;' and that the circuit courts of the United States have jurisdiction thereof. And that the crime of robbery, as mentioned in the said act of congress, is the crime of robbery as recognized and defined at common law.

This court is further of opinion, that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging also exclusively to subjects of a foreign state, is not piracy

within the true intent and meaning of the act, entitled, 'an act for the punishment of certain crimes against the United States,' and is not punishable in the courts of the United States.

This court is further of opinion, that when a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. If the government of the union remains neutral, but recognizes the existence of a civil war, the courts | of the union cannot p. 644
consider as criminal those acts of hostility, which war authorizes, and which the new government may direct against its enemy. In general, the same testimony which would be sufficient to prove that a vessel or a person is in the service of an acknowledged state, must be admitted to prove that a vessel or person is in the service of such newly erected government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits. And the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal.

All which is ordered to be certified to the circuit court of the United States for the district of Massachusetts.

The Divina Pastora.—The Spanish Consul, claimant.

(4 Wheaton, 52) 1819.

The government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the Courts of the Union are bound to consider as lawful, those acts which war authorizes, and which the new governments in South America may direct against their enemy.

Unless the neutral rights of the United States, (as ascertained by the law of nations, the acts of congress, and treaties,) are violated by the cruizers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the Courts of a neutral country.

Where the pleadings in a prize, or other admiralty cause, are too informal and defective to pronounce a final decree upon the merits, the cause will be remanded to the Circuit Court, with directions to permit the pleadings to be amended, and for farther proceedings.

APPEAL from the Circuit Court of Massachusetts.

The petition or libel, in this cause, by the Consul of his Catholic Majesty at Boston, alleges and propounds, 1. That there lately arrived at the port of New Bedford, in this district, and is now lying in the said port of N. B., a Spanish vessel, called the Esperanza, otherwise called the Divina Pastora, having on board a cargo, consisting of cocoa, cotton,

indigo, hides, and horns, of great value, to wit, of the value of 10,000 dollars; that the said vessel is navigated by seven persons, who are all American citizens, as he is informed, and believes; and that there are
p. 53 no | other persons on board of said vessel, and none other were on board when the said vessel arrived at said port. That the aforesaid persons say, that the said vessel was bound on a voyage from Laguira to Cadiz in Spain, and that she was captured by a privateer, or armed vessel, sailing under a flag, which they denominate, the flag of La Plata; and that they did intend to carry said vessel to some port in the West Indies, but, afterwards, came into the port of New Bedford. 2. That the said vessel and cargo purport to have been consigned to Antonio Seris, a merchant at Cadiz. 3. That the said Consul verily believes, that the said vessel has been captured and brought into the aforesaid port, contrary to the law of nations, and in violation of the rights of the said Antonio Seris, and that the said Antonio is justly and lawfully entitled to the possession of the said vessel and her cargo: concluding with a prayer, that the process of the Court may issue, directed to the Marshal of this district, or his deputy, requiring of them, respectively, to take the said vessel and cargo into custody, to the end, that due inquiry may be made into the facts pertaining to this case, and that the property may be adjudged, decreed, and restored, according to the just rights of whomsoever may be therein interested, and according to law and the comity which the United States have always manifested towards foreign nations.

The plea and answer of 'Don Daniel Utley, a citizen of the free and independent United Provinces of Rio de la Plata, &c., in behalf of himself
p. 54 and all concerned, in the capture of the Spanish polacre brig | Divina Pastora and her cargo, to the libel and petition exhibited by Don Juan Stoughton, Consul of his Catholic Majesty, &c.,' sets forth, that the said Utley, by protestation, and not confessing or acknowledging any of the matters and things in the libellant's petition and libel contained, to be true, in such manner and form as the same are therein and thereby alleged, for plea to the said libel and petition, says, that the United Provinces of Rio de la Plata in South America, are free and independent states, and, as such, have the power to levy war and make peace, raise armies and navies, &c. And that the Supreme Provisional Director of said Provinces, at the fort of Buenos Ayres, on the 25th day of October, 1815, commissioned a certain schooner, called the Mangoree, to cruize against the vessels and effects of the kingdom of Spain, and the subjects thereof, excepting only the Spanish Americans who defend their liberty, and authorized one James Barnes to act as commander of said schooner, and to seize and capture the vessels and effects of European Spaniards, and bring them within the government of the United Provinces, for adjudication, according to the law of nations, Ferdinand VII., king of Spain,

then being at war with said provinces, and general reprisals having been granted by said provisional government against the European subjects of the said king. That said schooner Mangoree, bearing the flag of the said independent Provinces, sailed on a cruise from the harbour of Buenos Ayres, within the said Provinces, on or about the first day of January, 1816, by virtue of said commission. And having touched | at Port au p. 55
Prince, in the island of Hispaniola, sailed again on said cruise, and on the 31st of October, 1816, on the high seas, &c. captured the polacre brig Divina Pastora, belonging to the said king, or to his European subjects, on board of which brig said Utley was put as prize-master. And the original crew of said prize was taken out by the said Barnes, &c., and put on board of said schooner Mangoree, and a prize crew sent on board the Pastora. And the said Barnes, &c., then appointed said Utley to the command of the said prize, and delivered to him a copy of his commission, &c., which the said Utley now brings with him, and respectfully submits to the inspection of this honourable Court. And thereupon, the said Utley proceeded to navigate the said prize from the place where she was captured to Port-au-Prince, in the island of Hispaniola, for the purpose of there procuring supplies and provisions, and thence proceeding to the port of Buenos Ayres. The plea then proceeds to state, that in the prosecution of the voyage, the prize vessel was compelled, by stress of weather, and want of provisions and water, to put into the port of New Bedford ; and concludes with alleging, that by the law of nations, and the comity and respect due from one independent nation to another, it does not pertain to this Court, nor is it within its cognizance, at all to interfere, or hold plea respecting said brig or goods on board, so taken as prize of war, and a prayer for restitution, with costs and damages.

The replication of the Spanish Consul states, that inasmuch as the said Utley, in his plea, admits that | the said vessel, and the cargo laden p. 56
on board, were, on the 31st day of October, 1816, the property of a subject or subjects of his majesty Ferdinand VII., the said consul claims the same, as the property of such subject or subjects, the names of whom are to him, at present, unknown ; excepting that he verily believes the same to be the lawful property of Antonio Seris, as he, in his petition, hath set forth : And avers, that the same ought to be restored and delivered up for the use of the Spanish owner or owners. The replication then proceeds to aver, that as the said vessel is stated in the plea to have been captured on the high seas by a certain armed vessel called the Mangoree, commanded by one James Barnes, which armed vessel is stated to have been commissioned under a certain authority called the United Provinces of Rio de la Plata in South America, the said capture and seizure, &c. were piratical, or tortious, and contrary to the lawful and well known rights of the faithful subjects of his said majesty, to whom the same belonged

at the time of such capture, &c., and that no right of property thereby vested in the said Barnes or Utley, or any other person or persons who were navigating and sailing in the said armed vessel called the Mangoree : 1st. Because, at the time when the said pretended capture as prize of war was made, &c., the several provinces situate in South America, and near to the river called Rio de la Plata, were provinces and colonies of his said majesty Ferdinand VII., and now are provinces and colonies of his said majesty ; and that the same had been, for a long course of years,
p. 57 provinces and colonies of the | successive kings of Spain ; and that all the people, persons, and inhabitants dwelling therein, were, on the 21st day of October, 1815, and for a long time before had been, and now are Spanish subjects, and did at the aforesaid times, and now do owe allegiance and fidelity to his said majesty. 2dly. Because the said subjects and persons, dwelling in the said provinces and colonies in South America, had not, on the 25th day of October, 1815, nor had any, or either of the said subjects and persons, then, or at any other time, any lawful right, power, or authority, to commission any vessel or vessels, or any person or persons whomsoever, to wage war against him, the said Ferdinand VII., nor against his subjects, or their persons, or property, by sea, or elsewhere ; and that no person or persons whomsoever, could lawfully receive, and take from any person or persons in any of the said colonies or provinces, any commission, power, or authority, of right, to wage war, and make captures of any property on the high seas. 3dly. Because all captures made on the high seas, under the pretence of power or authority derived from, or in virtue of any such commission as set forth in said plea, is unlawful and piratical ; and that all pretended captures and seizures, as prize of war, of property belonging to the subjects of his said majesty when made under such commissions as aforesaid, are cognizable by the Courts of nations at peace and in amity with his said majesty, which hold pleas of admiralty and maritime jurisdiction, and take cognizance of cases arising under the law of nations, whenever the property
p. 58 so captured is found within | their respective jurisdictions. And as a further ground for the claim of restitution to the original Spanish owners, the replication recites the 6th, 9th, and 14th articles of the treaty of 1795, between the United States and Spain. And as a further ground for the claim, it alleges, that the papers, exhibited with the plea, and by which the capture is pretended to be justified, are false and colourable ; that the prize crew did not speak the Spanish language, and were shipped at Port-au-Prince ; that one of the crew stated in his affidavit that the flag of the privateer was obtained at that place ; and that all of them stated, that the Divina Pastora, from the time of her capture, was ordered for, and bound to the same place, all the captured persons having been previously taken out of her, and put on board the privateer. And

concludes with renewing the averments of the piratical and tortious capture, and praying that restitution of the property may be decreed to him, the Spanish consul, to be held for the right owners or owner thereof, who are subjects, or a subject of the king of Spain.

Upon these pleadings, further proceedings were had in the District Court, under which a decree was pronounced of restitution of the vessel and cargo to the libellant, for the benefit of the original Spanish owners. This decree was affirmed, *pro forma*, in the Circuit Court, and the cause was brought by appeal to this Court.

February 3d.

Mr. *Winder*, for the appellants, argued, that there was nothing stated in the allegation of the Spanish | consul, or in the other pleadings in the p. 59
cause, by which a prize court of this country could take jurisdiction of this capture. Nothing was alleged to show that it was made within our neutral territory, or in violation of our neutral rights by an armament fitted out, or augmented in our ports; the only two cases in which the tribunals of a neutral country can assume jurisdiction of captures made *jure belli*. The present capture was made *jure belli*, because made under a commission from the United Provinces of the Rio de la Plata. The government of the United States, recognizing the existence of a civil war between Spain and the United Provinces, but remaining neutral, the Courts of the United States must consider as legal, those acts of hostility which war authorizes, and which the new government may direct against the parent country.[1] Possession under the capture is *prima facie* evidence sufficient to maintain that possession, unless it is shown that the libellants have a better right. But that possession is admitted, and nothing is shown by the pleadings to authorize the Courts of this country to devest it from the captors. There is no infraction of the treaty with Spain pleaded, which can give our Courts jurisdiction to restore to the former Spanish owners. The 6th and 9th articles of the treaty of 1795 are the only articles which can have any bearing upon the case, and these only provide for restitution where the capture is made within our territorial limits, *or*, where it is made by pirates. But it is not pretended, that the present capture | was made within our territorial jurisdiction; and the p. 60
Court has already determined, that a capture under a commission from the revolted provinces is not a piratical capture.

Mr. *Webster* and Mr. *D. B. Ogden*, contra, contended, that the District Courts of the United States are Courts of the law of nations, and that a general allegation of a marine tort, in violation of the law of nations, is sufficient, *prima facie*, to give them jurisdiction, where the captured property is brought within our territory. As a general allegation of prize

[1] The United States v. Palmer, 3 *Wheat.* 610. 634.

is sufficient,[1] so is a general allegation of an unlawful capture. It then becomes incumbent upon the captors to show that the capture was made under a commission from a sovereign power in amity with the United States. A neutral tribunal has a right to inquire, whether the commission was regularly issued by a competent authority, in order to see whether the capture was piratical, or in the exercise of the lawful rights of war.[2] The general rule, unquestionably, is, that the Courts of the captor's country have the exclusive cognizance of all seizures as prize: but to this rule there are exceptions, as ancient, and as firmly established as the rule itself. Among these is the case of a capture made by an armament fitted out or augmented within neutral territory. A capture thus made
p. 61 in violation of the neutral sovereignty | deprives the Courts of the belligerent country of their exclusive jurisdiction, and confers it on the Courts of the neutral state, who will exercise it by making restitution to the injured party.[3] The acts of congress, and the Spanish treaty, prohibiting the equipment of armed vessels in our ports, and imposing the obligation to restore captures made by them, are merely accumulated upon the pre-existent law of nations, which equally prohibited the one, as an injury to friendly powers, and enjoined the other, as a correspondent
p. 62 duty.[4] But even if this were not the law | of nations, the treaty with

[1] The Fortuna, 1 *Dodson.* The Adeline, 9 *Cranch*, 244. 284.

[2] Talbot v. Jansen, 3 *Dall.* 159. The Invincible, 1 *Wheat.* 258. 2 Sir *L. Jenkins*, 727.

[3] Talbot v. Jansen, 3 *Dall.* 133. 164. The Alerta, 9 *Cranch*, 359. 364.

[4] *Vattel, L.* 3. *c.* 7. *s.* 104, 105. 2 *Rutherforth, c.* 9. *s.* 19. *p.* 553. *Martens on Privateers, s.* 13. *p.* 42. *Burlamaqui, p.* 4. *c.* 3. *s.* 20, 21. 23. 2 Sir *L. Jenkins*, 727, 728.

'So that upon this whole matter of fact, there do arise two questions: The one, whether the commission whereby this Ostender was taken, is a good commission? The other, whether this capture was not a violence to that protection and safe guard, which your majesty's authority affords unto strangers, coming upon their lawful occasions towards any of your majesty's harbours or ports?

'As to the commission, 'tis true, his majesty of Portugal is not obliged, in granting out commissions, to take his measures from the English, or any other foreign style; yet the general law determines all commissions, (most especially, such as this is,) to be *stricti juris*, and not to be farther extended, either by inferences or deductions, than the express words do naturally import. So that, whatever the meaning of that clause be, viz., that *de Bills* may set out a man of war, and what other vessels shall be necessary for him, (as if he might have several vessels at sea, at one and the same time, and yet, himself and his commission can be but in one of them,) it cannot be said, that he hath liberty to substitute or depute another to act in his place, since there is no such power of deputation given him by his commission: Much less can a copy or translation be authentick, when there is no clause providing to that effect in the original; especially in this case, which is as little favourable as can be in the eye of the law.

'The second question is, as I humbly conceive, best resolved out of a declaration, which your majesty's grandfather of blessed memory, published in the year 1604, in reference to these hostilities, in these words:

'Our pleasure is, that within our ports, havens, roads, creeks, or other places of our dominion, or so near to any of our said ports or havens, as may be reasonably construed to be within that title, limits, or precinct, there shall be no force, violence, or surprize, or offence, suffered to be done, either from man of war to man of war, or from man of war to merchant, &c., but that all of what nation soever, so long as they shall be within those our ports and places of jurisdiction, or where our officers may prohibit violence, shall be understood to be under our protection, and to be

Spain and the acts of congress make it the law of this Court. 'Every treaty,' says Sir W. Scott, 'is a part of the private | law of that state which p. 63
enters into it.'[1] This principle of public law is expressly recognized by our municipal constitution, in which treaties entered into by the United States, are declared to be a part of the supreme law of the land. The Spanish treaty and the acts of congress pronouncing the illegality of captures in violation of our neutrality, the duty to restore the captured property to the original owner follows as a corollary. Supposing the allegations to be sufficiently pleaded, the proofs will fully authorize the Court in decreeing restitution to the original Spanish owners in this case. But if the Court should be of opinion, that the pleadings are defective, it will not dismiss the injured party, but will permit him to assert his rights in a new allegation.[2]

February 5th.

Mr. Chief Justice MARSHALL delivered the opinion of the Court. The decision at the last term, in the case of the United States v. Palmer,[3] establishes the principle that the government of the United States, having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the Courts of the Union are bound to consider as lawful, those acts which war authorizes, and which | the new governments p. 64
in South America may direct against their enemy. Unless the neutral rights of the United States, as ascertained by the law of nations, the acts of congress, and treaties with foreign powers, are violated by the cruizers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the courts of a neutral country. If, therefore, it appeared in this case, that the capture was made under a regular commission from the government established at Buenos Ayres, by a vessel which had not committed any violation of our neutrality, the

ordered by course of justice, &c. And that our officers and subjects shall prohibit, as much as in them lies, all hovering of men of war, &c., so near the entry of any of our havens or coasts; and that they shall receive and succour all merchants and others, that shall fall within the danger of any such as shall await our coasts, in so near places, to the hindrance of trade to and from our kingdoms.'

'So that, considering this shallop set out of your majesty's port, where it hovered for prey; since it was mann'd for the most part with your majesty's subjects, contrary to the meaning of the 4th and 6th articles of the treaty with Spain, made in the year 1630; since the surprisal was made in the night, not by force of arms, but by abusing your majesty's name and authority; since the true commission was neither pretended showed, nor, indeed, on board at the time of the capture; I am of opinion, that the capture was unduly made, and that the Ostender ought to have his ship and goods restored to him, and that the commander in the shallop, and the English on board, deserve to be punished. All which I do with all humility submit to your majesty's royal wisdom.'

L. JENKINS.'

[1] The Eenrom, 2 *Rob.* 8.
[2] The Adeline, 9 *Cranch*, 284. The Edward, 1 *Wheat.* 261. 269. The Samuel, *ib.* 13. note *g*.
[3] 3 *Wheat.* 610.

captured property must be restored to the possession of the captors. But if, on the other hand, it was shown, that the capture was made in violation of our neutral rights and duties, restitution would be decreed to the original owners. But the pleadings in this case are too informal and defective to pronounce a final decree upon the merits. The proceedings in the admiralty must always contain at least a general allegation of such a nature as will apply to the case, as of prize, &c. The Court has always endeavoured to keep these proceedings within some kind of rule, though not requiring the same technical strictness as at common law. Here the pleadings present a case which may be consistent with the demand of the former owners for restitution, but which is tied up to such a state of facts as, if proved, will not authorize it; and will not admit the introduction of evidence varying from the facts alleged. The decree
p. 65 of the Circuit Court must, therefore, | be reversed, and the cause remanded to that Court, with directions to permit the pleadings to be amended, and for farther proceedings.

Cause remanded.[1]

[1] It is a principle which has been frequently laid down by this Court, that it is the exclusive right of governments to acknowledge new states arising in the revolutions of the world, and until such recognition by our government, or by the government of the empire to which such new state previously belonged, courts of justice are bound to consider the ancient state of things as remaining unchanged. Rose v. Himely, 4 *Cranch*, 292. Gelston v. Hoyt, 3 *Wheaton*, 324. The distinction between the recognition of the independence of a newly constituted government which separates itself from an old established empire, and the recognition of the existence of a civil war between such new government and the parent country, is obvious. In the latter case the very object of the contest is what the former supposes to be decided. But in the mean time, all the belligerent rights which belong to anciently established governments, except so far as they may be restrained by treaty stipulations, belong to both parties. The obligations which neutrality imposes, are also to be fulfilled towards each party. What are those obligations, and how they may be affected by the misconduct of the belligerents, has been frequently made a subject of decision in this Court.

Thus where the commander of a French privateer, called the *Citizen Genet*, having captured, as prize, on the high seas, the sloop Betsey, sent the vessel into the port of Baltimore; and upon her arrival there, the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution, because the *vessel* belonged to subjects of Sweden, a neutral power, and the *cargo* was owned jointly by Swedes, and by citizens of the United States, also neutral; it was held, that the District Court of Maryland had jurisdiction competent to inquire, and to
p. 66 decide, whether in such case, restitution ought to be made to the claimants, or either of them, in whole or in part; that is, whether such restitution could be made consistently with the law of nations, and the treaties and laws of the United States. Glass v. The Betsey, 3 *Dall.* 6. 16. This case has been sometimes criticised as involving a denial of the unquestionable principle of public law, that the judicial cognizance of prizes belongs exclusively to the tribunals of the captor's country, with the admitted exceptions of a violation of neutral sovereignty either in making the capture, or fitting out the armament with which it is made, within the neutral territory. But, as is very justly observed by the Court in the case of the *Invincible*, the only point settled by the case of *Glass* v. *The Betsey* was, that the Courts of the neutral country have jurisdiction of captures made in violation of its neutrality, and the case was sent back with a view that the District Court should exercise jurisdiction, subject, however, to the law of nations on this matter, as the rule to govern its decision. 1 *Wheaton*, 257.

So, also, it was held, in the same case, that no foreign power can, of right, institute

The Experiment.

(4 Wheaton, 84) 1819.

Depositions, taken on farther proof, in one prize cause, cannot be invoked into another.

APPEAL from the Circuit Court of Massachusetts.

This was a question of collusive capture.

Feb. 8th.

The *Attorney General* moved to invoke into this cause depositions taken, on farther proof, in the case of the George, reported *Wheaton, vol.* I, p. 408.

Mr. Chief Justice MARSHALL. Original evidence and depositions taken on the standing interrogatories, may be invoked from one prize cause into another. But depositions taken as farther proof in one cause, cannot be used in another.

Motion refused.[1]

or erect any court of judicature, of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties: and that the admiralty jurisdiction which had been exercised in the United States by the consuls of France in the beginning of the war of 1793, not being so warranted, was illegal. Glass v. The Betsey, 3 *Dall.* 6. 16.

The District Courts of the United States have no jurisdiction on a libel for damages for the capture of a vessel as prize by the commissioned cruizer of a belligerent power, although the captured vessel is alleged to belong to citizens of the United States, and although the capturing vessel and her commander be found and proceeded against within the jurisdiction of the Court; the captured vessel having been captured and carried *infra præsidia* of the captors. The United States v. Peters, 3 *Dall.* 121.

The capture of a vessel from a belligerent power, by a citizen of the United States, under a commission from another belligerent power, (though the captor sets up an act of expatriation, not carried into effect by a departure from the United States, with an intention to settle permanently in another country,) is an unlawful capture, and the Courts of the United | States will decree restitution to the original owner. p. 67
Talbot v. Jansen, 3 *Dall.* 133. 164. A capture by a citizen of a neutral state, who sets up an act of expatriation to justify it, is unlawful, where the removal from his own country was by sailing, *cum dolo et culpa*, in the capacity of a cruizer against friendly powers. *Ib.* 153. *Quære*, Whether a citizen of the United States, expatriating himself according to the law of a particular State of the Union, of which he is also a citizen, can be considered as having lost the character of a citizen of the United States, so as to be authorized to capture under a foreign commission the

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[1] But in other respects, cases of collusive and joint captures form an exception to the general rules of evidence in prize causes. In cases of this nature, the usual simplicity of the prize proceedings is departed from, because the standing interrogatories are more peculiarly directed to the question of prize or no prize, as between the captor and captured, and are not adapted to the determination of questions of joint or collusive capture. It is, therefore, almost a matter of course to permit the introduction of farther proof in these cases. The George, *Wheaton*, vol. I. p. 408. But this farther proof must be of such a nature as is admissible by the general rules of prize | evidence. Under what circumstances these rules permit the invocation p. 85
of papers and depositions, may be seen, *Wheaton*, vol. II. *Appendix, note* i. p. 23.

The Caledonian.—Dickey, claimant.

(4 Wheaton, 100) 1819.

A vessel and cargo, which is liable to capture as enemy's property, or for sailing under the pass or license of the enemy, or for trading with the enemy, may be seized after her arrival in a port of the United States, and condemned as prize of war. The *delictum* is not purged by the termination of the voyage.

Any citizen may seize any property forfeited to the use of the government, either by the municipal law, or as prize of war, in order to enforce the forfeiture; and it depends upon the government whether it will act upon the seizure; if it proceeds to enforce the forfeiture by legal process, this is a sufficient confirmation of the seizure.

APPEAL from the Circuit Court of Rhode Island.

Feb. 3d.

p. 101 This cause was argued by Mr. *D. B. Ogden* for | the appellant and claimant,[1] and by the *Attorney General* for the United States.[2]

Mr. Justice STORY delivered the opinion of the Court. This is the case of an American ship, which sailed from Charleston, S. C., with a cargo of rice, bound to Lisbon, about the 28th of May, 1813, under the protection

property of powers in amity with the United States? *Ib.* 153. A capture by a vessel, built, owned, and fitted out as a vessel of war, in a neutral country, is unlawful, and restitution of the property captured by such vessel, will be decreed by the Courts of the neutral country, if brought within its jurisdiction. *Ib.* 155. 167. Every illegal act committed on the high seas, does not amount to piracy. A capture, although not piratical, may be illegal, and of such a nature as to induce the Court to award restitution. *Ib.* 154. 160. A capture made by a lawfully commissioned cruizer through the medium and instrumentality of a neutral, who had no right to cruize, is unlawful; and the property captured will be restored by the neutral state, if brought within its jurisdiction. *Ib.* 155. 167. The exemption of belligerent captures on the high seas, from inquiry by neutral courts, belongs only to a belligerent vessel of war, *lawfully commissioned;* and if a vessel claims that exemption, it is the duty of the Court, upon application, to make inquiry, *whether she is the vessel she pretends to be. Ib.* 159. If, upon such inquiry, it appears, that the vessel pretending to be a lawful cruizer, is really not such, but uses a colourable commission for the purposes of plunder, she is to be considered by the law of nations, so far at least, as the title of property or right of possession is concerned, in the same light as having no commission at all. *Ib. Primâ facie,* all piracies and trespasses com-
p. 68 mitted against the general law of nations, | are inquirable, and may be proceeded against, in any nation where no special exemption can be maintained either by the general law of nations, or by some treaty which forbids or restrains it. *Ib.* 160.

Where a vessel belonging to one belligerent was captured by another belligerent, and being abandoned on the high seas by the captors, to avoid the necessity of weakening their force by manning the prize, was found and taken possession of by citizens of the United States, and brought into a port of this country, and libelled in the District Court for salvage; it was held, that the District Court had jurisdiction upon the subject of salvage, and, consequently, a power of determining to whom the residue of the property, after payment of salvage, ought to be delivered. M'Donough

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[1] He cited the Nelly, Note to the Hoop, 1 *Rob.* 219. The Two Friends, 1 *Rob.* 283. The Thomas Gibbons, 8 *Cranch,* 421, to show, that the vessel could not be seized *as prize,* after her arrival in port, nor by a non-commissioned seizor.

[2] He cited the Ariadne, 2 *Wheat.* 143.

of a British license. In the course of the voyage the ship was captured by a British frigate, and sent into Bermuda for adjudication. Upon trial

et al. v. The Mary Ford, 3 *Dall.* 188. 198. In this case the captors acquired, immediately on the capture, such a right as no neutral nation could justly impugn or destroy; and it could not be said by the Court, that the abandonment of the captured vessel revived the interest of the original proprietors. One third of the value of the property was, therefore, decreed to the neutral salvors, and the residue restored to the captors. *Ib.* This case has been sometimes supposed to involve the inconsistency of a neutral tribunal assuming jurisdiction of the question of prize, or no prize, as an incident to that of salvage. But an attentive examination of the case will show that this is a mistaken supposition. The Court do not enter into the question of prize between the belligerents, but decree the residue to the late possessor: thus, making the fact of possession as between the belligerent parties, the criterion of right. Those points which could be disposed of without any reference to the legal exercise of the rights of war, the Court proceed to decide; but those which necessarily involve the question of prize, or no prize, they remit to another tribunal. L'Invincible, 1 *Wheaton*, 259.

Where the vessel which captured the prize in question, had been built in the United States, with the express view of being employed as a privateer, in case the then existing differences between Great Britain and the United States should terminate | in war; some of her equipments were calculated for war, though frequently p. 69
used by merchant ships; she was subsequently sold to a subject of one of the belligerent powers, and by him carried to a port of his own country, where she was completely armed, equipped, and furnished with a commission, and afterwards sailed on a cruize, and captured the prize: It was held, that this was not an illegal outfit in the United States, so as to invalidate the capture, and give their Courts jurisdiction to restore to the original owner the captured property. Moodie v. The Alfred, 3 *Dall.* 307. A mere replacement of the force of a privateer in a neutral port is not such an outfit and equipment as will invalidate the captures made by her, and give the Courts of the neutral country jurisdiction to restore the captured property to the original owner. Moodie v. The Phœbe Anne, 3 *Dall.* 319.

A vessel and cargo belonging to citizens of the United States was captured as a prize by a cruizer belonging to one of the belligerent powers on the high seas, and run on shore within the territory of the United States, by the prize master, to avoid recapture by the other belligerent, and *abandoned by the prize crew;* the vessel and cargo were then attached by the original owner, and an agreement was entered into by the parties, that they should be sold, and the proceeds paid into the District Court, to abide the issue of a suit commenced by the owner against the captors for damages: *Held*, that they were responsible for the full value of the property injured or destroyed, and that whatever might originally have been the irregularity in attaching the captured vessel and cargo, *it was obviated by the consent of the captors that the prize should be sold, and that the proceeds of the sale should abide the issue of the suit.* Del Col v. Arnold, 3 *Dall.* 233. The consistency of the Court in this case cannot be vindicated with the same facility as in that of the Mary Ford. 'We are, however, induced to believe, from several circumstances, that we have transmitted to us but an imperfect sketch of the decision in that case. The brevity with which a case is reported, which we are informed, had been argued successively at two terms, by men of the first legal talents, necessarily suggests this opinion; and when we refer | to the case of the Cassius, (The United States v. Peters,) decided but the term p. 70
preceding, and observe the correctness with which the law applicable to this case, in principle, is laid down in the recitals to the prohibition, we are confirmed in that opinion. But the case itself (that of Del Col v. Arnold) furnishes additional confirmation. There is one view of it in which it is reconcilable to every legal principle. It appears, that when pursued by the Terpsichore, the Grand Sachem was wholly abandoned by the prize crew, and left in possession of one of the original American crew, and a passenger; that, in their possession, she was driven within our territorial limits, and was actually on shore when the prize crew resumed their possession, and plundered and scuttled her. Supposing this to have been a case of total derelict, (an opinion, which, if incorrect, was only so on a point of fact, and one in support of which much might have been said, as the prize crew had no proprietary interest, but only a right founded on the fact of possession,) it would follow, that the subsequent resumption of possession was tortious, and subjected the parties to damages.

she was acquitted, and her cargo being prohibited from exportation, was afterwards sold by the agent of the claimant at Bermuda, and the proceeds

On the propriety of the seizure of the Industry, to satisfy those damages, the Court give no opinion, but place the application of the proceeds of the sale of this vessel, on the ground of consent; a principle, on the correctness of the application of which to that case, the report affords no ground to decide.' L'Invincible, 1 *Wheaton*, 259. 260.

A public vessel of war belonging to a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the Courts of the country. The Exchange, 7 *Cranch*, 116. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all other nations with whom it is at peace, and they enter such ports, and remain in them under the protection of the government of the place. *Ib.* 141. Whether the public ships of war enter the ports of another friendly nation, under the license implied by the absence of any prohibition, or under an express stipulation by treaty, they are equally exempt from the local jurisdiction. *Ib.* 141.

p. 71 Where the *private* vessels of one nation | enter the ports of another, under a general implied permission only, they are not exempt from the local jurisdiction. *Ib.* 143. The sovereign of the place is capable of destroying the implication, under which national ships of war, entering the ports of a friendly power, open for their reception, are considered as exempted by the consent of that power from its jurisdiction. He may claim and exercise jurisdiction over them, either by employing force, or by subjecting such vessels to the ordinary tribunals. *Ib.* 146. But until such power be expressly exerted, those general provisions which are descriptive of the ordinary jurisdiction of the judicial tribunals, and give an individual, whose property has been wrested from him, a right to claim that property in the Courts of the country where it is found, ought not to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction. *Ib.* 146. Upon these grounds it was determined, in this case, that a public vessel of war, belonging to the emperor Napoleon, which had before been the property of a citizen of the United States, and, as alleged, wrongfully seized by the French, coming into our ports, and demeaning herself peaceably, could not be reclaimed by the former owner in the tribunals of this country. *Ib.*

The general rule as to the prize jurisdiction is, that the trial of captures made on the high seas, *jure belli*, by a duly commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the Courts of that nation to which the captor belongs. The Alerta, 9 *Cranch*, 359. 364. But to this rule there are exceptions as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country, into which the prize is brought, or by a privateer which has been illegally equipped in such neutral country, the prize Courts of such neutral country not only possess the power, but it is their duty to restore the property so illegally captured to the owner. *Ib.* 364. Talbot v. Jansen, 3 *Dall.* 133. *Ib.* 288. *note.* A neutral nation may, if so disposed, without a breach of its neutral character, grant permission to both belligerents to equip their vessels of war within its territory. But without such permission, the subjects of the belligerent powers have no right

p. 72 to equip vessels, or to augment their force, either | with arms, or with men, within the territory of the neutral nation. The Alerta, 9 *Cranch*, 365. All captures made by means of such equipments of vessels, or augmentation of their force within the neutral territory, are illegal in respect to the neutral nation, and it is competent for its courts to punish the offenders, and in case the prizes taken by them are brought *infra præsidia*, to order them to be restored. *Ib.* Even if there were any doubt as to the rule of the law of nations on the subject, the illegality of equipping a foreign vessel of war within the territory of the United States, is declared by the act of June 5th, 1794, c. 226.* and the power and duty of the proper court of the United States, to restore the prizes made in violation of that act, is clearly recognized. *Ib.* To constitute an illegal equipment or augmentation of the force of a vessel within the territory of the United States, it is immaterial whether the persons enlisted are native citizens, or foreigners domiciled within the United States. Neither the law of nations, nor the act of congress, recognizes any distinction in this respect, except as to subjects

* This act was made perpetual by that of April 24th, 1800, c. 189. which was repealed, and all laws respecting our neutral relations were incorporated into one, by the act of the 20th of April, 1818, c. 93.

were remitted for his use. The ship sailed from Bermuda for the United States, in November, 1813, and upon her arrival at Newport, in Rhode-Island, was seized by the collector of that port as forfeited to the United States. The libel contains four articles propounding the causes of forfeiture; first, for the ship's having on board, and using a British licence; secondly, for the ship's being engaged in trade with the enemy; and, thirdly and fourthly, for using a British license contrary to the act of congress on the 2d of August, 1813, ch. 56. prohibiting the use of British licenses.

It is unnecessary to consider the two last articles | which are founded p. 102
upon statutable prohibitions, because, it is clear, that the two preceding articles, founded on the general law of prize, are sufficient to justify a condemnation *jure belli*, the proof of the facts being most clearly established.

The only questions which can arise in the case, are whether the ship was liable to seizure for the asserted forfeiture, after her arrival in port; and, if so, whether the collector had authority to make the seizure. And we are clearly of opinion in favour of the United States on both points. It is not necessary, to enable the government to enforce condemnation in this case, that there should be a capture on the high seas. By the general law of war, every American ship sailing under the pass, or license of the enemy, or trading with the enemy, is deemed to be an enemy's ship, and forfeited as prize. If captured on the high seas, by a commissioned vessel, the property may be condemned to the captors as enemy's property; if captured by an uncommissioned ship, the capture is still valid, and the property must be condemned to the United States. But the right of the

of the foreign state in whose service they are so enlisted, being transiently within the United States. *Ib.* 366.

During the late war between the United States and Great Britain, a French privateer, called the Invincible, and duly commissioned, was captured by a British cruizer, afterwards recaptured by a private armed vessel of the United States; again captured by a squadron of British frigates; again recaptured by another United States privateer, and brought into a port of the United States for adjudication. Restitution on payment of salvage was claimed by the French consul on behalf of the owners of the Invincible. A claim was also interposed by citizens of the United States, who alleged, that their property had been unlawfully taken by the Invincible, before her first capture, on the high seas, and prayed an indemnification from the proceeds. Restitution to the original French owner was decreed by the Circuit Court, which decree was affirmed in this Court; and it was determined that the tribunals of this country have no jurisdiction to redress any supposed torts committed on the high | seas upon the property of our citizens, by a cruizer regularly p. 73
commissioned by a foreign and friendly power, except where such cruizer has been fitted out in violation of our neutrality. *L'Invincible*, 1 *Wheaton*, 238. S. C. 2 *Gallis*, 29.

Vide infra, the cases of the *Estrella*, and the *Neustra Senora de la Caridad*, in which the same principles which are collected in this note were applied to captures of Spanish property by Venezuelean and Carthagenian privateers, and the property was restored to the original owners, or to the captors, according as the capture had, or had not been made in violation of our neutrality.

For the different public acts by which the government of the United States has recognized the existence of a civil war between Spain and her American colonies, see 4 Wheaton, Appendix, note II.

government to the forfeiture, is not founded on the capture; it arises from its general authority to seize all enemies property coming into our ports during war; and also from its authority to enforce a forfeiture against its own citizens, whenever the property comes within its reach. If, indeed, the mere arrival in port would purge away the forfeiture, it would afford the utmost impunity to persons engaged in illegal traffic
p. 103 during war, for in most instances, the government | would have no means of ascertaining the offence until after such arrival.

In respect to the other point, it is a general rule, that any person may seize any property forfeited to the use of the government, either by the municipal law, or by the law of prize, for the purpose of enforcing the forfeiture. And it depends upon the government itself, whether it will act upon the seizure. If it adopts the acts of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure, and is of equal validity in law, with an original authority given to the party to make the seizure. The confirmation acts retroactively, and is equivalent to a command.

Decree affirmed, with costs.

The Langdon Cheeves.—Lamb, claimant.

(4 Wheaton, 103) 1819.

A question of fact upon a seizure in port, as a droit of admiralty, for trading with the enemy, and using his license. The circumstance of the vessel having been sent into an enemy's port, for adjudication, and afterwards permitted to resume her voyage, held to raise a violent presumption that she had a license, which the claimant not having repelled by explanatory evidence, condemnation was pronounced.

APPEAL from the Circuit Court of Rhode-Island.

February 3d.

p. 104 This cause was argued by Mr. *Hunter*, and Mr. | *Wheaton* for the appellant and claimant,[1] and by the *Attorney General* for the United States.

February 16th.

Mr. Justice STORY delivered the opinion of the Court. This case differs in no essential respect, from that of the Caledonian. The brig sailed from the United States on a voyage to Lisbon, with a cargo of provisions, in May, 1813, and was captured by a British sloop of war, and sent into Bermuda, where she was either not proceeded against as prize, or was acquitted on trial; and after a detention of about six weeks,

[1] They cited the Imina, 3 *Rob.* 167. The Lisette, 6 *Rob.* 387. The Joseph, 8 *Cranch*, 451. to show, that the *delictum* of contraband, of trading with the enemy, and navigating under his license, are all purged by the termination of the voyage.

was permitted to resume her original voyage; and on the return voyage from Lisbon, with a cargo of salt, was, on her arrival at Newport, on the 16th of December, 1813, seized by the collector of that port, as forfeited to the United States *jure belli*, for using a British license, and trading with the enemy.

There is no positive proof, that the brig had a British license on board; but, we think, that under the circumstances, there raises a violent presumption that she had such a license, and that the burthen of proof to repel this presumption rests on the claimant. He has not attempted this in the slightest degree, there being a total absence of all evidence in his favour; and, therefore, as the case remains with all its original imperfections, the decree of the Circuit Court is affirmed, with costs.

Decree affirmed, with costs.

The Friendschaft.—Moreira, claimant.

(1 Wheaton, 105) 1819.

The property of a house of trade established in the enemy's country is condemnable as prize, whatever may be the personal domicil of the partners.

APPEAL from the Circuit Court of North Carolina.

The shipment in this case was made on the 31st of March, 1814, at London, by the house of trade of Moreira, Vieira & Machado, of that city, on account and risk of the house, to Mr. Moreira, one of the partners, who was a native of, and domiciled at Lisbon, in the kingdom of Portugal. The shares of the two partners, Messrs. Vieira & Machado, who were domiciled at London, were condemned as prize of war in the Court below, without appeal. The share of Mr. Moreira, the partner domiciled at Lisbon, was condemned in the Court below; but the claimant was allowed to make farther proof to be offered to this Court, and to be admitted or rejected in the discretion of the Court, as to his proprietary interest and connexion with the house of trade in the enemy's country. On the production of the farther proof, the proprietary interest of Mr. Moreira in one third part of the goods was clearly proved, and also the fact of his personal domicil at Lisbon.

February 20th.

Mr. *Hopkinson*, for the claimant, relied upon this evidence as sufficient to show, that the claimant was entitled to restitution of his share, on account of his personal domicil, notwithstanding his being a partner | in p. 106
the house of trade established in the enemy's country.

Mr. *D. B. Ogden*, and Mr. *Wheaton*, contra, insisted, that the shipment being made by a house of trade established in the enemy's country, for

the account and risk of that house, the neutral domicil of one of the partners would not avail to save his share from condemnation as prize.[1] In the British tribunals, this principle is recognized by the highest authority known to the prize law, that of the Lords of Appeal, and if it be material, (as it seems to have been intimated by this Court,[2]) to distinguish whether the decision was pronounced before, or since our independence, the *onus* is thrown upon the claimant to show, that the case of Mr. Coopman, decided in 1793, was determined contrary to former practice, or former precedents. It does, indeed, appear, that an erroneous notion had been adopted by some persons, that the domicil of the party was all that the prize Court had a right to consider. But in Coopman's case, that notion was exploded by the lords, and the true principle on which the cases from which it had been imbibed, were determined, was explained as applying to cases *merely at the commencement of a war;* whilst the rule, applicable to a neutral partner entering into a house of trade in the enemy's country *during* the war, or continuing that
p. 107 connexion *after* | a declaration of war, is developed, not as a new rule then for the first time prescribed, but as the application of an anciently established principle.[3]

February 25th.

Mr. Justice STORY delivered the opinion of the Court. The shipment in this case was made by Moreira, Viera, & Machado, a house of trade established in London, on the account of the house, to Moriera, one of the partners in the house, who was a native of, and domiciled in, Lisbon, in the kingdom of Portugal; and the only question is, whether the share of Moreira in the shipment is exempted from condemnation by reason of his neutral domicil. It has been long since decided in the Courts of Admiralty, that the property of a house of trade established in the enemy's country, is condemnable, as prize, whatever may be the domicil of the partners. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicil of any of the company. The rule then, being inflexibly settled, we do not now feel at liberty to depart from it, whatever doubt might have been entertained, if the case were entirely new.

Decree affirmed with costs.

[1] The Nancy, claim of Mr. Coopman, cited in the Vigilantia, 1 *Rob.* 14, 15. The Susa, 2 *Rob.* 255. The Indiana, cited in the Portland, 3 *Rob.* 44.

[2] 9 *Cranch*, 198.

[3] 1 *Rob.* 12. 14, 15.

The Estrella.—Hernandez, claimant.

(4 Wheaton, 298) 1819.

The seal to the commission of a new government, not acknowledged by the government of the United States, cannot be permitted to prove itself; but the fact, that the vessel cruising under such commission is employed by such government, may be established by other evidence, without proving the seal.

Where the privateer, cruising under such a commission, was lost, subsequent to the capture in question, the previous existence of the commission on board was allowed to be proved by parol evidence.

Where restitution of captured property is claimed, upon the ground that the force of the cruiser making the capture has been augmented within the United States, by enlisting men, the burthen of proving such enlistment is thrown upon the claimant; and that fact being proved by him, it is incumbent upon the captors to show, by proof, that the persons so enlisted were subjects or citizens of the prince or state under whose flag the cruiser sails, *transiently* within the United States, in order to bring the case within the proviso of the 2d section of the act of June 5th, 1794, c. 226. and of the act of the 20th April, 1818, c. 83.

The right of adjudicating on all captures and questions of prize, exclusively belongs to the Courts of the captors' country: but, it is an exception to the general rule, that where the captured vessel is brought, or voluntarily comes, *infra præsidia* of a neutral power, that power has a right to inquire whether its own neutrality has been violated by the cruiser which made the capture; and, if such violation has been committed, is in duty bound to restore, to the original owner, property captured by cruisers illegally equipped in its ports.

No part of the act of the 5th of June, 1794, c. 226. is repealed by the act of the 3d of March, 1817, c. 58.; the act of 1794, c. 226. remained in force until the act of the 20th of April, 1818, c. 83., by which all the provisions respecting our neutral relations were embraced, and all former laws on the same subject were repealed.

In the absence of any act of Congress on the subject, the Courts of the United States would have authority, under the general law of nations, | to decree restitution p. 299
of property captured in violation of their neutrality, under a commission issued within the United States, or under an armament, or augmentation of the armament, or crew, of the capturing vessel, within the same.

Appeal from the District Court of Louisiana.

This vessel and her cargo were libelled in the District Court for the Louisiana district, by the alleged former Spanish owner. The libel stated, that he was owner of the schooner and cargo, which sailed from Havanna, for the coast of Africa, on the 23d of April, 1817; that, on the next day, she was lawlessly and piratically captured, on the high seas, and held as prize, by an armed schooner, called the Constitution of Venezuela, and forcibly brought within the jurisdiction of the United States, when she was recaptured by the United States' ketch the Surprize, and conducted to New-Orleans. That the captors had no lawful commission from any sovereign state to commit hostilities at sea; but that the said schooner and cargo, until their re-capture, were forcibly withheld from the libellant.

in open violation and contempt of the law of nations. That if they had such commission, the same was issued, or delivered, within the waters and jurisdiction of the United States, with intent that the said vessel, the Constitution, should be employed in the service of Venezuela, to commit hostilities at sea against the subjects of the king of Spain, with whom the United States then were, and now are, at peace, in violation of their laws, and of the laws of nations. The libel further stated, that the Constitution
p. 300 had, previously to her cruising, been fitted out, and armed, | or increased or augmented in force, within the jurisdiction and waters of the United States; and, also, that she had been manned by sundry citizens or residents of the United States, with the intent that she should be employed to commit hostilities, as aforesaid, in violation of the laws aforesaid. For these causes the libellant prayed a restitution to him of the Estrella and cargo.

A claim was interposed by J. F. Lamoureux, prize-master of the Estrella, which stated, that the Constitution was duly commissioned by the Republic of Venezuela, and authorized to capture all vessels belonging to its enemies, under which authority she had captured the Estrella, which, with her cargo, belonged to the enemies of the said republic. That, before he could receive his prize commission, the Constitution upset, in a gale, and her commission and papers, with the greater part of the crew, were lost. The claimant further represented, that, as he was carrying the Estrella into port, to have her condemned before a court of competent jurisdiction, she was captured by the United States' ketch Surprise, and conducted to New-Orleans: and, therefore, claimed, that the Estrella and cargo might be adjudged to be restored to him.

It appears, from the transcript of the proceedings in this case, that the Estrella was also libelled on the part of the United States, although it is not stated for what cause such libel was filed, but the same was dismissed; from which decree there was no appeal. |

p. 301 It appeared in evidence, that the Constitution had a commission from the government of Venezuela, at the time the capture was made, which was issued and delivered at Carthagena; but that the same was lost by the sinking of the privateer, immediately after the capture. There was some contradictory testimony as to her having increased her armament in the United States, and it was proved that she had augmented the number of her crew in the port of New-Orleans.

On the libel filed by the Spanish owner, decree was made, that the claim of Lamoureux, the prize-master, be dismissed, with costs, and that the Estrella and cargo be delivered up and restored to the libellant; from which sentence the cause was brought, by appeal, to this Court.

February 18th.

Mr. *C. J. Ingersoll*, for the appellant and captor, argued that the law of nations gave to the Courts of the captor's country the exclusive cognizance of questions of prizes made under its authority; and that the only exceptions to this general rule were to be found in the acts of Congress for preserving our neutral relations. In the present case, there was no sufficient evidence that the armament of the capturing vessel had been increased within the United States, so as to give our Courts jurisdiction to restore the captured property, upon this ground; and that the 2d section of the act of the 5th of June, 1794, c. 226., which prohibited the enlistment of men within our territory, was impliedly repealed by the act of March 3d, 1817, c. 58., which contained | no such prohibition, and which was the law p. 302
in force at the time this case occurred. But even if it were otherwise, the only proof of an increase of the crew was the hearsay of interested witnesses; and supposing their testimony to establish the fact, still the *onus probandi* was upon the claimant, to show that the persons so enlisted were not citizens of Venezuela, transiently within the United States, and so coming within the proviso of the 2d section of the act of 1794, c. 226. The existence of a commission, regularly issued by the government of Venezuela, within its own territory, which was on board the privateer previous to the capture, was sufficiently proved; and the court has already determined, that the same testimony which would be sufficient to prove that a cruising vessel is in the service of an acknowledged state, is sufficient to prove that it is in the service of a newly created government, like that of Venezuela.[1]

Mr. *Sergeant*, contra, argued, upon the facts, that the right of the original Spanish owner to restitution was established by satisfactory proof, both of the increase of the armament and crew of the privateer within the United States. He insisted, that the act of 1794, c. 226. was not repealed by that of 1817, c. 58.; and that, even if it were, the right to restitution depended upon the general law of nations, and treaties.[2] The claimant having proved the facts of | an increase of the crew in New- p. 303
Orleans, the *onus probandi* of showing that the persons enlisted were citizens of Venezuela, transiently within the United States, was thrown upon the captors. The commission, under which the capture was professedly made, being that of a new government, not yet acknowledged by the United States, its commission ought to have been produced, and the seal proved; and if actually lost with the privateer, an exemplified copy ought to have been obtained duly authenticated by the proper officers of that government. All the circumstances of the case combined

[1] The United States v. Palmer, 3 *Wheat.* 610. 635.
[2] 1 *Wheat.* 244. note *c.* 2 *Sir L. Jenkins' Works*, 727. *Ib.* 780.

to show that this was not a capture in the regular exercise of the rights of war; but a piratical seizure, in breach of our neutrality, aggravated by an intention to violate the revenue laws, which was evinced by the fact of the vessel having been found hovering on the coast of Louisiana, instead of being conducted to the ports of Venezuela for adjudication.

March 2d.

Mr. Justice LIVINGSTON delivered the opinion of the Court.

The first allegation of the Spanish owner is, that the Constitution had no lawful commission from any sovereign state to commit hostilities at sea; and he contends, that the commission in the present case, if any there was, being that of a government not acknowledged by the United States, ought to have been produced, and its seal proved; or that if the vessel carrying it had been lost, yet an exemplification of it ought to have been obtained from the proper department of the state which
p. 304 issued it. | The Court is satisfied with the proof which has been made, of the Constitution having had a commission at the time of making the capture, and that such commission was granted by the government of Venezuela; and also, that the same was lost with the privateer herself, a very short time after the prize crew took possession of the Estrella. The fact of the sinking of the Constitution is not disputed; and that she had, at the time she went down, a commission on board, is also fully made out, which commission there is no reason to believe was any other than the one which the Collector of New-Orleans says was on board when she arrived in that port from Carthagena. This was some time in the month of October, in the year 1816: Mr. Chew then saw the commission, and describes it as a very regular one from the Venezuelan Republic, signed, as others were, by Bolivar. Although the Court, in another case, has said, that the seal of a government unacknowledged cannot be permitted to prove itself: it has, in the same case, said, that the fact of a vessel being so employed may be established without proving the seal.[1] But if the Constitution had a commission on board, it is next alleged, that the same was issued or delivered within the waters of the United States, with intent that she should be employed in the service of Venezuela, to commit hostilities, at sea, against the subjects of the king of Spain, with whom the United States were at peace. This allegation is
p. 305 not supported by any evidence; | on the contrary, the same witnesses who declare that the Constitution was a commissioned vessel, and whose testimony has already been adverted to, establish, beyond controversy, that the same was obtained abroad, and not issued or delivered within the United States.

The libel next alleges, that the Constitution, previous to her last

[1] The United States v. Palmer, 3 *Wheat.* 635.

cruise, had been fitted out and armed, or that her force had been increased or augmented, within the jurisdiction and waters of the United States, and also that she had there been manned by sundry citizens or residents of the United States with the same intent.

Whatever doubt there may be as to the augmentation of the armament of the Constitution within the United States, the Court is satisfied that a very considerable addition was made to her crew, at New-Orleans, after her arrival at that port; one of the custom house officers declares, that, at that time, she had only from twenty to twenty-five men. Another of these officers, who went on board on her first arrival, states the number of her crew at about twenty; and a witness by the name of Guzman, totally unconnected with this transaction, mentions by name two persons who entered on board while she was lying there. Several of the original crew of the Estrella have also been examined to this point, who state, that after the capture, they had many conversations with the officers and seamen, who composed the prize crew, by whom they were informed that the Constitution, when she left Carthagena, had but few hands on board; that at New- | Orleans she shipped almost the whole of her crew, which p. 306
at the time of the Estrella's capture, amounted to sixty or seventy men. This species of testimony has been objected to, as being hearsay, and proceeding from a source entitled to no great credit: although there may be something in this objection, it is no reason for rejecting the evidence altogether. If the testimony be hearsay, it must be recollected that the declarations proceeded from persons very much interested in giving a different representation of the transaction; and as to the witnesses themselves, although they formed a part of the Estrella's crew, and may have felt some little interest in the question, they were the only persons who could give any account of the armament or crew of the Constitution, at the time of her making the capture. It may be also remarked, that the testimony of these men is in this respect corroborated by that of other witnesses, who are liable to no objection, and that their declarations, if untrue, might have been disproved by the claimant, by showing where and when the crew of the Constitution had been entered. But if any of the crew of the Constitution were enlisted or entered within the jurisdiction of the United States, they may, it is said, have been citizens or subjects of the republic of Venezuela, who were transiently in the United States at the time of her arrival, and had, therefore, a right, within one of the provisoes of the second section of the act of Congress, of the 7th of June, 1794, c. 226. to enlist or enter themselves on board of her; and it is insisted, that the libellant should have shown that they were not persons of this | description. The Court is not of this opinion. On the libellant, p. 307
in the first instance, lay the *onus* of showing that the crew of the Constitution, had been increased within the United States; having done this,

it became incumbent on the captors, if they wanted to establish their innocence, to show, as was in their power, if the fact was so, that they had done nothing contrary to law, by bringing their case within the proviso that has been mentioned.

The allegation, then, in the libel being made out, that the Constitution, being a privateer commissioned by the republic of Venezuela, was manned within the United States, previous to the cruise on which she captured the Estrella, by sundry citizens or residents of the United States ; it remains to see whether the libellant has not made out a case for restitution.

It has been attempted, but without success, to distinguish this case in principle from several which have already been decided in this Court. We have been told, as heretofore, that to the courts of the nation to which the captor belongs, and from which his commission issues, exclusively appertains the right of adjudicating on all captures and questions of prize. This is not denied ; nor has the Court ever felt any disposition to intrench on this rule ; but, on the contrary, whenever an occasion has occurred, as in the case of the Invincible,[1] it has been governed by it. Not only is it a rule well established by the customary and conventional
p. 308 law of nations, but it is | founded in good sense, and is the only one which is salutary and safe in practice. It secures to a belligerent the independence to which every sovereign state is entitled, and which would be somewhat abridged, were he to condescend so far as to permit those who bear his commission to appear before the tribunals of any other country, and submit to their interpretation, or control, the orders and instructions under which they have acted. It ensures, also, not only to the belligerent himself, but to the world at large, a great degree of caution and responsibility, on the part of the agents whom he appoints ; who not only give security to him for their good behaviour, but will sometimes be checked in a lawless career, by the consideration that their conduct is to be investigated by the Courts of their own nation, and under the very eye of the sovereign, under whose sanction they are committing hostilities. In this way, also, is a foundation laid for a claim by other nations, of an indemnity against the belligerent, for the injuries which their subjects may sustain, by the operation of any unjust or improper rules, which he may think proper to prescribe for those who act under his authority. But general, and firmly established as this rule is, it is not more so than some of the exceptions which have grown out of it. A neutral nation, which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own Courts, of the validity of every capture made under their respective commissions, and to decide on every question of
p. 309 prize law, which may | arise in the progress of such discussion. But it is

[1] 1 *Wheat.* 238.

no departure from this obligation, if, in a case in which a captured vessel be brought, or voluntarily comes, *infra præsidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture. So long as a nation does not interfere in the war, but professes an exact impartiality toward both parties, it is its duty, as well as right, and its safety, good faith, and honour demand of it, to be vigilant in preventing its neutrality from being abused, for the purposes of hostility against either of them. This may be done, not only by guarding, in the first instance, as far as it can, against all warlike preparations and equipments in its own waters, but, also, by restoring to the original owner such property as has been wrested from him, by vessels which have been thus illegally fitted out. In the performance of this duty, all the belligerents must be supposed to have an equal interest, and a disregard, or neglect of it, would inevitably expose a neutral nation to the charge of insincerity, and to the just dissatisfaction and complaints of the belligerent, the property of whose subjects should not, under such circumstances, be restored.

The United States, instead of opening their ports to all the contending parties, when at peace themselves, (as may be done, if not prevented by antecedent treaties,) have always thought it the wisest and safest course, to interdict them all from fitting out or furnishing vessels of war within their limits, and to punish those who may contribute to such equipments. To enforce a general and strict observance of this neutrality, on the part p. 310
of our own citizens, and of others who reside among us, a law passed, as early as the year 1794, making it penal, among other things, for any one, within the jurisdiction of the United States, to enlist in the service of any foreign prince or state, as a soldier, marine, or seaman, on board of any vessel of war, letter of marque, or privateer. This law, it is supposed, was not in force at the time when the crew of the Constitution was increased at New-Orleans, having been repealed, as is alleged, by the act of the 3d of March, 1817, c. 58. But this act contains no repealing clause of this or any other section of the former law ; and having made no provision on the subject of enlistment, it must have been the intention of the legislature to leave in full force all those parts of the first law which had undergone no alteration, in the one which was then passing, and we therefore find no repeal of the act in question, until the 20th of April, 1818, when all the provisions respecting our neutral relations were embraced by one act, and all former laws on the same subject were repealed. But whether the act of 1794, c. 226. were in force or not, would make no difference ; for it did not, in terms, contain, nor did any of the others, which have, from time to time, been passed, contain a provision for the restitution of property captured on the ocean, by vessels

which might be thus illegally fitted out, or manned in our ports. It is true, they recognize a right in the Courts of the United States to make restitution,
p. 311 when these laws have been disregarded, and impart | to the Courts a power to punish those who are concerned in such violations. But in the absence of every act of Congress in relation to this matter, the Court would feel no difficulty in pronouncing the conduct here complained of, an abuse of the neutrality of the United States; and although, in such case, the offender could not be punished, the former owner would, nevertheless, be entitled to restitution. Nor is our opinion confined to the single act of an illegal enlistment of men, which is the only fact proved in this case; for we have no hesitation in saying, that for any of the other violations of our neutrality alleged in the libel, if they had been proved, the Spanish owner would have been equally entitled to restitution.

Sentence affirmed, with costs.

The Neustra Senora de la Caridad.—Bages et al. claimants.

(4 Wheaton, 497) 1819.

A cruiser, equipped at the port of Carthagena, in South America, and commissioned under the authority of the province of Carthagena, one of the United Provinces of New Grenada, at war with Spain, sailed from the said port, and captured on the high seas, as prize, a vessel and cargo belonging to the subjects of the king of Spain, and put a prize crew on board; and ordered her to proceed to the said port of Carthagena; the captured vessel was afterwards fallen in with by a private armed vessel of the United States, and the cargo taken out and brought into the United States for adjudication as the property of their enemy. The original Spanish owner, and the prizemaster from the Carthagenian cruiser, both claimed the goods. The possession was decreed to be restored to the Carthagenian prizemaster.

War having been recognized to exist between Spain and her colonies by the government of the United States, it is the duty of the Courts of the United States, where a capture is made by either of the belligerent parties without any violation of our neutrality, and the captured prize is brought innocently within our jurisdiction, to leave things in the same state they find them; or to restore them to the state from which they have been forcibly removed by the act of our own citizens.

The Spanish treaty held not to apply to the above case, as the Court could not consider the Carthagenian captors as pirates, and the capture was not made within the jurisdictional limits of the United States; the only two cases in which the treaty enjoins restitution.

APPEAL from the Circuit Court of North Carolina.

This was a prize allegation against certain goods, taken by a private armed vessel of the United States, the Harrison, during the late war
p. 498 with Great Britain, | out of a ship called the Neustra Senora de la Caridad. A claim was interposed by Salvador Bages, and others, Spanish subjects, domiciled at St. Jago, in the island of Cuba, alleging that the ship was a Spanish ship, and with the goods, their property, was captured on the

high seas, by an armed vessel cruizing under the pretended colours of Carthagena, the commander of which produced no commission, nor did the claimants know, or admit, he had one, and who detained the Caridad as prize, and put a prize crew on board. That having separated from the capturing vessel, they were met with and boarded by the privateer Harrison. That the said privateer captured and took possession of the Caridad, and the captors unladed the cargo from on board of her, into the Harrison, and having brought the same into the port of Wilmington, North Carolina, proceeded against it as prize of war.

A cross claim was filed by Pedro Brugman, master and commander of the Carthagenian armed schooner Neustra Senora de la Popa, in behalf of himself, and others, the owners of said privateer, to the goods thus proceeded against as prize of war by the commander, officers, and crew of the Harrison. This claim pleaded, that the goods were not at the time of the proceedings, nor at the time of capture by the Harrison, the property of any British subjects, or of any persons domiciled in the dominions of Great Britain, nor of any of the enemies of the United States, but that the same then were, and yet are, the property of the owners, officers, and crew of the La Popa, from whose lawful possession the same | had been violently and wrongfully taken, on the high seas, by the p. 499
Harrison, as before mentioned. That the La Popa, having been duly commissioned by the sovereign authority of the independent State of Carthagena, and furnished with letters of marque and reprisal, authorizing her to capture, on the high seas, the property of the enemies of said State, left the port of Carthagena in the month of December, 1814, on a cruise. That on the 21st of January, 1815, while cruising off St. Jago de Cuba, the said privateer La Popa, commanded by the claimant, seized and captured the ship La Caridad, sailing from Jamaica to Cuba, loaded with dry goods, and belonging, with the cargo, to the enemies of the said independent State of Carthagena, as the papers on board, and the information of the master and crew, convinced the claimant to be the fact. That the claimant put a prizemaster and crew on board the captured vessel, and ordered her to proceed to the said port of Carthagena. That the said prizemaster and crew retained the possession for four days, and while they were proceeding to Carthagena, the Caridad was forcibly taken by the Harrison from their possession, the goods taken out, and brought into the port of Wilmington, as aforesaid.

An order was made by the Court below, that the claimant, Pedro Brugman, should be allowed to make farther proof, that the commission which he produced, and under which he alleged the original capture to have been made, was issued by the authority acting as the sovereign authority of the United Provinces of New-Grenada. |

At the hearing it was proved, by the testimony of witnesses, that the p. 500

La Popa belonged to and had been actually fitted out in Carthagena, one of the said United Provinces of New Grenada; that the commission produced by the commander, was in the usual form in which letters of marque were issued by the sovereign authority of that Province; that the seal affixed to the same was the seal used at the time by those who exercised the sovereign authority of Carthagena to authenticate the commissions by them granted; that the officers of state by whom the same was signed, were at the time, and had been for some time before, respectively, the Governor and the Secretary of War, and the Marine of the said Province; that the witnesses were acquainted with the hand writing of the said Governor and Secretary, the witnesses having often seen them write, as well as seen their public and acknowledged writings, and verily believed the same to be their signatures. And the commission was also proved to be genuine, and to have regularly issued, by the certificates and declarations of the officers of state of the Province of Carthagena. The original capture by the La Popa, the retaking by the Harrison, and the proprietary interest of the original Spanish owners of the goods were all fully proved.

The Circuit Court decreed, at May term, 1818, the goods to be restored to the possession of Pedro Brugman; from which sentence an appeal was taken to this Court by the claimant, Salvador Bages, for himself and the original Spanish owners.

The cause was submitted without argument. |

p. 501

March 12th.

Mr. Justice JOHNSON delivered the opinion of the Court.

This case arose out of a capture made in the late war. The La Popa, a commissioned cruiser of the Province of Carthagena, had made prize of the Caridad, a Spanish vessel, in a voyage from Jamaica to Cuba. The American private armed vessel Harrison fell in with the Caridad, then in possession of the prize crew of the La Popa, and suspecting her cargo to be British, took possession of it, and transhipped it into their own vessel. On the arrival of the Harrison in a port of North Carolina, the cargo was claimed both by the Caridad and La Popa, and finally restored to the La Popa.

This is an appeal from the decision of the Circuit Court of North Carolina, made by the original Spanish owner, and the case has been submitted on the evidence and the grounds taken in the argument below.

There is no doubt that the property was Spanish, nor that the privateer La Popa was commissioned as a cruiser, whilst the Province of Carthagena had an organized government; and there is the fullest evidence that her armament and equipment was unaffected by any charge of having been made in violation of our laws.

The only question in the case is, whether an original Spanish owner is entitled to the aid of the Courts of this country, to restore to him property of which he has been dispossessed by capture, under a commission derived from the revolted colonies? and this question is considered, by this court, as having | been fully decided by the principles p. 502
assumed in the case of the United States v. Palmer,[1] at the last term, and by the decisions in the cases of the Estrella [2] and Divina Pastora [3] at the present term.

War notoriously exists, and is recognized by our government to exist, between Spain and her colonies. This is an appeal to the highest of all tribunals on a question of right. No neutral nation can act against either, without taking part with the other in the war. All that the law of nations requires of us, is strict and impartial neutrality. And no friendly nation ought to demand of the Courts of this country to do an act which may involve it in a war with the victor. Our duty is, where the property of either is brought innocently within our jurisdiction, to leave things as we find them; much more to restore them to that state from which they have been forcibly removed by the act of our own citizens. The treaty with Spain can have no bearing upon the case, as this Court cannot recognize such captors as pirates, and the capture was not made within our jurisdictional limits. In those two cases only does the treaty enjoin restitution.

Decree affirmed, with costs.

The London Packet.—Merino, claimant.

(5 Wheaton, 132) 1820.

A question of proprietary interest on farther proof. Restitution decreed, with costs and expenses to be paid by the claimant.

In general, the circumstance of goods being found on board an enemy's ship raises a legal presumption that they are enemy's property.

THIS was the claim of a Spanish subject, to a parcel of hides laden on board of the London Packet, a British ship, at the port of Buenos Ayres, in South America, in the month of June, 1813. The London Packet, on her voyage to London, was captured by the private armed brig the Argus, and carried | into Boston for adjudication. On being p. 133
libelled in the District Court as prize of war, the consul of his Catholic Majesty filed a claim for the property in question in favour of Don Jeronimo Merino, a Spanish subject. The District Court condemned the vessel and the whole of the cargo, except these hides, which were restored to the claimant, the Court being satisfied there was not such proof of enemy's property therein, as to authorize a decree of condemnation. For the ship and residue of the cargo no claim was interposed. From

[1] 3 *Wheat.* 610. [2] 4 *Wheat.* 298. [3] 4 *Wheat.* 52.

this decree, as to the hides, there was an appeal by the captors to the Circuit Court, where the same was reversed. The Court, although it reversed the sentence which had been pronounced below, expressed its entire satisfaction as to the national character and domicil of the claimant, and that the hides had been originally shipped by him; but condemned the property, because, on the order for farther proof, no affidavit had been offered, either of the claimant or his confidential agent, or clerk, of his interest in the cargo at the time of the shipment. It was considered, that the absence of such a document, so universally expected and required by prize tribunals, unavoidably threw a suspicion over the cause, and being wholly unaccounted for, it authorized a belief that there had been a voluntary, if not a studied omission on the claimant's part. At the same term in which the sentence of reversal was pronounced, but not until after such sentence was known, the affidavit of the claimant, which had been received since the last adjournment of the
p. 134 Court, was produced by the Spanish Consul, with a petition | that the decree might be rescinded, for the purpose of admitting it into the case, or that the same might be so far opened, for the consideration of the Court, as to make the affidavit of Merino a part of the evidence therein, so as to accompany the other testimony in the appeal to this Court. Upon this application the Circuit Court ordered, that the affidavit should be received by the clerk, and sent up with the other papers *de bene esse*, subject to the directions of this Court. The affidavit had been taken on an order below for farther proof, but had not been received, as has been stated, when the decree of condemnation was pronounced.[1]

Mr. *Webster* and Mr. *Pitman*, for the captors, argued, that it was a well-settled principle in the Prize Court, that the *onus probandi*, lies on the claimant. 'In the Prize Court,' says Sir Wm. Scott, 'where special reasons for deception are perpetually occurring, and where the Court exercises a much more unconfined jurisdiction on questions of property than it exercises in its civil forum, proof of property lies generally on the claimant, and he may be called upon to support the *prima facie* evidence of a good title which is already exhibited.'[2] This burden would have rested on the claimant in the present case if the goods in question had been found on board of a *neutral* ship; but it is increased by the fact that the property was found on board an *enemy's*
p. 135 ship, and an enemy's | armed ship. The maxim as laid down by Grotius, is: '*Res hostium navibus presumuntur esse hostium, donec contrarium probetur.*' A presumption which, nevertheless, may be destroyed by *strong proofs* to the contrary.[3] In this case, the property was not only

[1] *Vide* S. C. 1 *Mason's Rep.* 14. 2 Wheaton, 371.
[2] The Countess of Lauderdale, 4 *Rob.* 234.
[3] *De Jure Belli ac Pac. b.* 3. *c.* 6. *s.* 6. *Bynk. Q. J. Pub. l.* 1. *c.* 13. *Loccenius, l.* 2. *c.* 4. *n.* 11.

found on board an enemy's armed ship, but was unaccompanied by the documentary evidence required to prove its neutrality. No papers were found at the time of capture relating to the cargo, except the bills of lading; and all the letters and invoices were sunk by the order of the master of the London Packet, in the letter bag, as sworn by two of the crew upon their examination on the standing interrogatories. The spoliation of papers, is, therefore, superadded to the fact of the property being found on board a ship of the enemy, destined to an enemy's port; and the claimant is called upon to produce the strongest, and most satisfactory proof to destroy the many presumptions arising from these facts, that, in truth, the property belongs to the enemy. The claimant has had abundant opportunity afforded him to produce this proof. The first order for further proof was made in the District Court the 26th of November, 1813, and the claimant was indulged until nearly the close of the year 1815, in the Courts below, to establish the verity of his claim. Having failed so to do, this Court afforded him further time, and he has had from February, 1816, until this term, a period of four years, to produce plenary proof in | reference to a claim so much p. 136
indulged, and surrounded with so many circumstances of suspicion. If the claimant has failed to produce this proof, the presumption is irresistible, that his claim must be false. In such a suspicious case, too, something more is to be expected from the claimant himself, than a mere test affidavit,[1] which is all the evidence (coming from himself) which the claimant has yet furnished.

Mr. *D. B. Ogden* and Mr. *Winder*, contra, admitted the rule of the Prize Court, that property found on board an enemy's vessel is presumed to be enemy's property: but, for this very reason, they insisted, such a vessel would seldom be made the vehicle of enemy's property intended to be covered as neutral. The records of the Court would show that in a great majority of the cases, where attempts have been made to disguise enemy's property, such attempts have been made by lading the goods on board a neutral vessel, in order to avoid that suspicion on which the rule of law is founded. But in this case, the presumption itself can have but little weight; because it appears in evidence that the claimant was compelled, by necessity, to lade his goods on board an enemy's vessel, there being, at that time none but British ships, at Buenos Ayres, destined for Europe, for which market his goods were intended. Some indulgence is due to the subjects of neutral States, who not having sufficient shipping of their own to carry on their trade, are compelled to resort to the navigation of other countries, | which may happen to p. 137
be belligerent. Nor can the circumstance of a spoliation of papers by the enemy master have any unfavourable effect upon the claim of a

[1] The Magnus, 1 *Rob.* 31.

neutral shipper conducting *bona fide*.[1] Even the actual resistance of the enemy master will not preclude the neutral shipper from receiving restitution, unless he participates in such resistance, and thus forfeits the privileges of his neutral character.[2] The counsel on both sides also argued upon the facts, with great minuteness and ability.

February 20th.

Mr. Justice LIVINGSTON delivered the opinion of the Court. In the argument of this cause, the counsel have not confined themselves to the effect which the affidavit of the claimant ought of itself to have upon the decision of it, but have animadverted on all the testimony below. The Court has, therefore, also extended its examination to all the proofs in the cause, and will now pronounce its judgment on them.

The captured vessel was confessedly British property, as well as a great part of its cargo, and its destination was to a port in the enemy's country, which raises a legal presumption, that the property claimed was not neutral. It is not denied, that a neutral may use the vessel of a belligerent, for the transportation of his goods, and whatever presumption may arise from the circumstance, that it is not of itself a cause of condemnation. In this case, it does not appear, nor was it
p. 138 probably the fact, that any neutral vessel | bound to London, was then at Buenos Ayres, and, therefore, this presumption ought to have but little influence on the present decision. If the proprietary interest be satisfactorily made out, the claimant is entitled to restitution.

There was no letter found on board from Merino to his correspondent in London, nor any invoice of this property. The only document relating to it was a bill of lading in Spanish, dated the 19th of June, 1813, purporting that 6,276 hides had been shipped on board the London Packet, by Jeronimo Merino, on his account and risk, to be delivered to Antonio Daubana, or in his absence to William Heiland, they paying the freight therein stipulated. This bill of lading was not signed by the master. To the omission of a signature to this bill of lading, much importance cannot be attached. It was found in possession of the master, and serving only as a memorandum for him of the cargo on board; and not being intended to pass into the hands of any other persons, it was a matter of indifference whether he put his name to it, or not. Of seven bills of lading which were found on board, no less than three were without his signature. Those which were delivered to the shippers, were, no doubt, signed, which was all that was necessary for their security. If this bill of lading be compared with the one produced, and proved by Daubana, it is impossible not to be struck with the exact similarity between them. They correspond in all respects, excepting

[1] The Friendschaft, 3 *Wheat.* 14. 48. [2] The Nereide, 9 *Cranch*, 388. 423.

only that one has not the signature of the captain, and appears most manifestly to have been filled up with the same ink, and in the | same p. 139
hand-writing, and at the same time; which is no small proof of their being cotemporaneous acts, and of the authenticity of the one which is now produced by the consignee. But no letter from Merino to his correspondent, nor any invoice, nor any bill of lading for the consignee, being found on board, it is urged, that the proof of proprietary interest is defective, and that the sentence of condemnation ought, therefore, to be affirmed. Had no farther proof been introduced, relieving the case from this difficulty, the argument would be entitled to great consideration. But the absence of those papers is now accounted for. It appears by the testimony of Stephenson, a passenger on board the London Packet, who was examined by the captors, that a large bag, containing a great number of private letters, and other papers, was sunk by order of the master of the London Packet, about half an hour before his vessel was taken. It is then but a fair presumption, that the letter, invoice, and bill of lading transmitted by Merino to his correspondent in London, were among the papers thus destroyed. The loss of these papers being thus accounted for, and the master of the captured ship not being brought in as he ought to have been, there was a propriety under the peculiar circumstances of this case, in affording, as the Court below did, an opportunity to the Spanish owner of offering subsidiary proof respecting the property mentioned in the bill of lading found on board, and which was claimed by him. This farther proof, which consists of documents from the custom house at Buenos Ayres, of the positive testimony | of Mr. Daubana, the consignee in London, and of the test-affidavit of p. 140
Mr. Merino himself, is satisfactory, that the proprietary interest of these hides was, at the time of shipment and of capture, in the claimant. That they belonged to Smith notwithstanding the mark of S. on some of them, as has been suggested, cannot be believed. On that supposition, his conduct is utterly inexplicable. If the adventure was on his account, the disguise of the shipment could have been intended for no other purpose than to impose, as to them, on the Courts of the United States; for this contrivance or cover could not protect his vessel from capture and condemnation. Yet, if we believe some of the witnesses, Smith declared, that the whole of the cargo belonged to himself, and some merchants in London. These declarations of Smith, as he was set at liberty by the captain of the Argus, and, of course, not examined on the standing interrogatories, ought not to militate against the integrity of the present claim; but if they were really made, they afford strong evidence, that if this bill of lading were designed as a cover for belligerent property, some other person, and not Smith, was to be benefitted by it. For if he were the real owner, why, it may be asked, did he voluntarily

abandon the property, (for he was put on board of another vessel, at his own request,) at the very moment when this fraud, if he ever intended to avail himself of it, was to be consummated? Why did he not remain in his vessel until her arrival in the United States, and apply to a Spanish
p. 141 Consul, or some other gentleman, to prefer a claim in favour of | the pretended Spanish owner? Why did he not support this claim with his own oath, as he must have intended to do if he ever intended to derive any advantage from a contrivance which must have had its inception at Buenos Ayres, at his instigation, and for his emolument? There is no accounting for his conduct on any other hypothesis, than that he had no interest in this property, and was, therefore, willing to leave it to its fate.

The counsel for the captors, aware of the full and conclusive nature of the proof, so far as it establishes Merino's interest in the merchandize claimed by him, have endeavoured to show that Merino was not at Buenos Ayres when this shipment took place, and if he was, that it is impossible that his letter, which bears date the 10th of July, 1813, could have been put on board of the London Packet, which had sailed on the 24th of June, fourteen days before. If this be so, a gross attempt has been made to impose on the Court, which ought to be followed with consequences fatal to the present claim. But the Court is not of opinion that either of these suppositions is supported by the evidence. Not a single witness whose testimony is relied on to establish the fact of Merino's not being at Buenos Ayres at the time of the shipment, speaks with any certainty, or tells us affirmatively where he then was. This negative testimony, which, if it stood alone and uncontradicted, might excite a strong suspicion, is rendered of very little consequence, by much proof of a contrary character. The custom house document which
p. 142 has already been referred to, establishes the residence of | Merino at Buenos Ayres at the date of the shipment; so does the affidavit of Merino himself, who is proved to be a gentleman of character, of property, and respectability. Daubana also swears to the same fact, with as much certainty as one correspondent can establish the domicil of another residing at so great a distance from each other. He proves that Merino remained there until the 15th of August following, at least, that he received a letter from him, dated at Buenos Ayres, on that day. Another witness, who saw him at Rio Janeiro in the year 1814, says, that he did not leave Buenos Ayres until after the middle of the year 1813. The weight of testimony, therefore, may be considered as in favour of the claimant being at Buenos Ayres when this shipment was made. Nor is it so certain, as seemed to be taken for granted at the bar, that the London Packet sailed on her voyage for Europe on the 24th of June, 1813. It is true, that the cook, and some others who were examined

in preparatorio, fix the time of her departure to that day; but the second mate, and only officer of the captured vessel who was examined, and who was most likely to know, says that she sailed in the month of July. Under this uncertainty respecting a fact which is deemed so material, and to which the claimant's attention has never been called, it cannot be expected that the Court should not only act upon it, as positively proved, but follow it up with the condemnation of property so clearly proved to belong to a neutral. It would be more charitable, and not unreasonable, even if the fact were proved, to presume that witnesses were speaking of the time | of the London Packet's first weighing p. 143
anchor at Buenos Ayres, and that she may for some reason or other have been detained in the river until the 10th of July, which is the date of Merino's first letter to his correspondent in London. It may be added, that it is not easy to believe, that if a fraud were intended, care would not have been taken to make the letter of advice, and all the other papers, correspond with the time of the departure of the vessel.

Upon the whole, a majority of the judges are of opinion, that upon the farther proof the sentence of the Circuit Court should be reversed, and the property restored to the claimant. But as the captors have been put to great expense in consequence of the imperfect documents found on board, and the great delay which has attended the production of the farther proof, they are of opinion that their costs and expenses must be paid by the claimant.

Decree reversed.

DECREE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Massachusetts, and the farther proof exhibited in this cause, and was argued by counsel. On consideration whereof, it is DECREED and ORDERED, that the Decree of the Circuit Court for the District of Massachusetts in this case, condemning six thousand two hundred and seventy-six ox hides, as good and lawful prize to the libellants, be and the same is hereby reversed and annulled. And this Court, proceeding to pass such Decree as the said Circuit Court should have passed, it is further DECREED and ORDERED, that the said six thousand two hundred and seventy-six ox hides, be restored to the claimant: And it is further DECREED, that the said Claimant pay to the Libellants the costs and expenses incurred in the prosecution of this suit.

The United States v. Klintock.

(5 Wheaton, 144) 1820.

A commission issued by Aury, as 'Brigadier of the Mexican republic,' (a republic whose existence is unknown and unacknowledged,) or as 'Generalissimo of the Floridas,' (a province in the possession of Spain,) will not authorize armed vessels to make captures at sea.

Quære—Whether a person acting with good faith under such a commission may be guilty of piracy?

However this may be, in general; under the particular circumstances of this case, showing that the seizure was made, not *jure belli*, but *animo furandi*, the commission was held not to exempt the prisoner from the charge of piracy.

The act of the 30th of April, 1790, *c.* 36. s. 8. extends to all persons, on board all vessels, which throw off their national character by cruizing piratically, and committing piracy on other vessels.

THIS was an indictment in the Circuit Court of Virginia, against Ralph Klintock, a citizen of the United States, charging him with a piracy committed on the high seas, in April, 1818, on a vessel called the Norberg, belonging to persons to the jurors unknown. He was found guilty generally.

The facts stated were, that the prisoner is a citizen of the United States; that the vessel in which he sailed as first lieutenant was called
p. 145 the Young | Spartan; was owned without the United States, and cruized under a commission from Aury, styling himself Brigadier of the Mexican Republic and Generalissimo of the Floridas, granted at Fernandina, after the United States' government took possession of it. That he was convicted of a piracy, committed on the Norberg, a Danish vessel, in consequence of practising the following fraud upon her. The second officer of the privateer brought on board some Spanish papers, which he concealed in a locker, and then affected to have found them on board. The vessel was then taken possession of, the whole original ship's company left on an island on the coast of Cuba, and the second officer being put in command, took the name of the original captain, sailed for Savannah, and entered her there, personating the Danish captain and crew. The Young Spartan followed, and put into a port in the vicinity.

The counsel for the prisoner moved, that the judgment be arrested on the following grounds:

First, That Aury's commission exempts the prisoner from the charge of piracy.

Second, That the fraud practised on the Dane does not support the charge of piracy, as an act piratically done, and not in the exercise of belligerent rights.

Third, That the prisoner is not punishable under the provisions of the 8th section of the act of 1790.[1] |

Fourth, That the act of the 30th of April, 1790, 8th section, 'entitled p. 146
an act for the punishment of certain crimes against the United States,' does not extend to an American citizen entering on board of a foreign vessel, committing piracy upon a vessel exclusively owned by foreigners.

Upon these errors in arrest of judgment, the judges of the Circuit Court were divided in opinion, and directed the points, with their division thereon, to be certified to this Court.

February 14th.

The *Attorney General*, for the United States, argued, 1. That although the government and Courts of the United States had acknowledged the fact of the existence of the new States in Spanish America, so as to legitimate the war between them and the parent | country,[2] yet Mexico p. 147
was not among the provinces in actual revolt, nor was any such State *de facto*, known to exist as the Mexican republic, under the authority of which the commission in question was issued. And even if there were such a power in existence exercising all the rights of war, Denmark is not at war with it, or with any other of the Spanish American provinces. 2. Although the fraud practised on the Dane, may not be in itself an act of piracy, yet the seizure was a piratical act, and the ingredient of fraud cannot change its character for the better. 3. Neither is the prisoner protected by the decision of this Court in the case of the United States v. Palmer.[3] That case merely decides, that the crime of robbery committed on board a ship belonging to subjects of a foreign power, by a foreigner, is not piracy, within the act of the 30th of April, 1790, c. 36. s. 8. But it does not decide, that the same offence, committed by a citizen, on board of a vessel not belonging to the subjects of any foreign power, is not piracy. The vessel on board of which the crime was committed, does not belong to any particular nation. A pirate,

[1] Which provides, 'That if any person or persons shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence, which, if committed within the body of a county, would by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandize to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death: and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may be first brought.'

[2] The Divina Pastora, 4 *Wheat.* 52. 65. note *a*, and the cases there collected. The Estrella, *Ib.* 298. The Neustra Senora de la Caridad, *Ib.* 497.

[3] 3 *Wheat.* 610. 630.

being *hostis humani generis*, is of no nation or State. He, and his confederates, and the vessel on board of which they sail, are outcasts from the society of nations. All the States of the world are engaged in a tacit
p. 148 alliance against them. An offence committed by them against | any individual nation, is an offence against all. It is punishable in the Courts of all. So, in the present case, the offence committed on board a piratical vessel, by a pirate, against a subject of Denmark, is an offence against the United States, which the Courts of this country are authorized and bound to punish.

Mr. *Winder*, contra, contended, that this case was decided by that of the United States v. Palmer. The only argument which can be urged for extracting this case out of that decision is, that the prisoner, in the present case, is a citizen of the United States, although the offence itself was committed on board of a foreign vessel. But the whole reasoning of the Court in Palmer's case, as well as the certificate of the judgment, shows, that in order to constitute the offences enumerated in the statute, it is indispensably necessary, not that the party should be a citizen, but that the vessel against which, and the vessel on board of which the offence is committed, should belong to citizens. It is insisted on the other side, that although the vessel now in question, does not belong to citizens of the United States, yet she does not belong to any particular foreign nation; and, therefore, does not fall within the letter of the authority referred to. But if by her not belonging to any particular foreign State, it be meant that she is a piratical vessel, then the case |
p. 149 falls within the late act of 1819, providing for the punishment of piracy as defined by the law of nations, and not within the act of 1790. If it falls within the act of 1790, then the act of 1819 is entirely superfluous. But that act was made to provide for the very defect in the former law which was for the first time discovered in the case of Palmer; and it is impossible, consistently with the authority of that case, to bring the present case within the statute, which was the only law in force, on the subject, at the time when this offence was committed.

February 25th.

Mr. Chief Justice MARSHALL delivered the opinion of the Court. The first and second points made by the counsel for the prisoner may be considered together.

As judgment can be arrested only for errors apparent on the record, we should feel no difficulty in certifying our opinion of the insufficiency of these on that ground, were we not persuaded that from some inattention, the questions which arise properly on a motion for a new trial, have been stated by the clerk as a motion in arrest of judgment, and that the same points, if undecided now, will recur when judgment is about to be pro-

nounced. In a criminal case especially, we think it proper to decide the question on its real, as well as technical merits.

So far as this Court can take any cognizance of that fact, Aury can have no power, either as Brigadier of the Mexican Republic, a republic of whose existence we know nothing, or as Generalissimo of the Floridas, a province in the possession of Spain, to issue commissions to authorize private or public vessels to make captures at sea. Whether a person acting with good faith under such commission, may or may not, be guilty of piracy; we are all of opinion | that the commission can be no p. 150
justification of the fact stated in this case. The whole transaction taken together, demonstrates that the Norberg was not captured *jure belli*, but seized and carried into Savannah *animo furandi*. It was not a belligerent capture, but a robbery on the high seas. And although the fraud practised on the Dane may not of itself constitute piracy, yet it is an ingredient in the transaction which has no tendency to mitigate the character of the offence.

The third and fourth errors assigned in arrest of judgment may also be considered together. The questions they suggest arise properly on the indictment, and require a reconsideration of the opinion given by the Court in Palmer's case.

The question propounded to the Court in that case was in these words: 'Whether the crime of robbery, committed by persons who are not citizens of the United States, on the high seas, on board of any ship or vessel belonging exclusively to the subjects of any foreign State or sovereignty, or upon the person of any subject of any foreign State or sovereignty, not on board of any ship or vessel belonging to any subject or citizen of the United States, be a robbery or piracy within the true intent and meaning of the said 8th section of the act of Congress, aforesaid, and of which the Circuit Court of the United States hath cognizance, to hear, try, determine, and punish the same?'

The same question was again propounded, so varied only as to comprehend the offence if committed | by American citizens in a vessel p. 151
belonging to foreigners.

The Court, in concluding its exposition of the act, thus sums up its opinion: 'The Court is of opinion, that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign State, on persons within a vessel belonging exclusively to subjects of a foreign State, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States.' The certificate of the Court conforms entirely to this opinion.

This opinion and certificate apply exclusively to a robbery or murder committed by a person on board of any ship or vessel belonging exclusively

to subjects of a foreign State. It is, we think, the obvious import of these words, that, to bring the person committing the murder or robbery within them, the vessel on board which he is, or to which he belongs, must be at the time, in point of fact, as well as right, the property of the subjects of a foreign State, who must have at the time in virtue of this property, the control of the vessel. She must at the time be sailing under the flag of a foreign State, whose authority is acknowledged. This is the case which was presented to the Court ; and this is the case which was decided. We are satisfied that it was properly decided.

But the reasoning which conducted the Court to this conclusion, is founded on sections of the act, the general words of which ought to be
p. 152 restricted to offences committed by persons who, at the time of | committing them, were within the ordinary jurisdiction of the United States ; and the language employed may well be understood to indicate an opinion that the whole act must be limited in its operation to offences committed by, or upon, the citizens of the United States. Upon the most deliberate reconsideration of that subject, the Court is satisfied, that general piracy, or murder, or robbery, committed in the places described in the 8th section, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the Courts of the United States. Persons of this description are proper objects for the penal code of all nations ; and we think that the general words of the act of Congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State, ought to be so construed as to comprehend those who acknowledge the authority of no State. Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign power ; but we think they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations.

CERTIFICATE.—This cause came on to be heard on the transcript
p. 153 of the record from the Circuit Court | for the District of Georgia, and was argued by counsel. On consideration whereof, this Court is of opinion :

1st. That Aury's commission does not exempt the prisoner from the charge of piracy.

2d. That although the fraud practised on the Dane may not in itself support the charge of piracy, the whole transaction, as stated in the indictment and in the facts inserted in the record, does amount to piracy.

3d. That the prisoner is punishable under the provisions of the 8th section of the act of 1790.

4th. That the act of the 30th of April, 1790, does extend to all persons on board all vessels which throw off their national character by cruizing piratically and committing piracy on other vessels.

The Josefa Segunda.—Carricabura et al. claimants.

(5 Wheaton, 338) 1820.

An information under the act of the 3d of March, 1807, c. 77. to prevent the importation of slaves into the United States. The alleged unlawful importation attempted to be excused upon the plea of distress. Excuse repelled, and condemnation pronounced.

Upon a piratical capture, the property of the original owners cannot be forfeited for the misconduct of the captors in violating the municipal laws of the country where the vessel seized by them is carried.

But where the capture is made by a regularly commissioned captor, he acquires a title to the captured property, which can only be devested by recapture, or by the sentence of a competent tribunal of his own country; and the property is subject to forfeiture for a violation, by the captor, of the revenue or other municipal laws of the neutral country into which the prize may be carried.

APPEAL from the District Court of Louisiana. From the proceedings in the Court below, it appeared, | that the brig Josefa Segunda being p. 339
Spanish property, and on a voyage from the coast of Africa to the island of Cuba, with a cargo of negroes, was captured on the 11th day of February, 1818, off Cape Tiberon in St. Domingo, by the Venezuelan privateer, the General Arismendi. On the 24th of April following, she was seized in the river Mississippi, by certain custom house officers, and conducted to New-Orleans, where a libel was filed against her in the District Court for the Louisiana district.

The libel contained four counts. The first alleged, that the said negroes were unlawfully brought into the United States from some foreign country in the said brig, with intent to hold, sell, or dispose of them as slaves, or with intent that the same should be held to service or labour, contrary to the act of Congress in such case made and provided.

The second count alleged, that these negroes were taken, received and transported on board the said brig, from some of the coasts or kingdoms of Africa, or from some other foreign kingdom, place, or country, for the purpose of selling them in some port or place within the jurisdiction of the United States, as slaves, or to be held to service or labour, contrary, &c. In the third count it was charged, that the said brig was found in some river, port, bay, or harbour of the United States, or on the high seas, within the jurisdictional limits of the United States,

or hovering on the coast thereof, to wit, in the river Mississippi, having on board some negroes, mulattoes, or people of colour, for the purpose of selling them as slaves, or with an intent to land the same, in some
p. 340 port or | place within the jurisdiction of the United States, contrary, &c. The fourth allegation or count was, that one hundred and seventy-five persons of colour, not being native citizens, or registered seamen of the United States, or natives of countries beyond the Cape of Good Hope, were landed from said brig, in a port or place, situate in a State which, by law, had prohibited the admission or importation as aforesaid, to wit, at or near the Balize in the State of Louisiana, contrary, &c.

This libel was filed on the 29th of April, 1818, and on the 5th of May following, a claim was interposed by Messrs. Carricabura, Arieta & Co. merchants of the Havanna, which stated, that they were owners of the said brig, which, with the said negro slaves, was on the high seas, while pursuing a lawful voyage, captured and taken from them by a certain Rene Beluche, and the crew of the armed ship or vessel called the General Arismendi, sailing under the flag of the revolted colonies of Venezuela and New-Grenada; that the said brig put into the Balize in very great distress, and without any intention on the part of the crew, or any other person on board, to infringe or violate any law of the United States. That whatever may have been the conduct of the prize crew, or of any other persons on board, the claimants insist, that they cannot be made responsible for any of their acts, because the said brig, with her cargo, was taken from their possession unlawfully, and in violation of the law of nations, inasmuch as the captors had no legal authority to take the
p. 341 same; and if they had any commission, the capture | was illegal, because the privateer the General Arismendi, was armed and fitted out, or her armament or equipment increased, in a port of the United States, in violation of the laws thereof.

On this libel and claim, it appeared in evidence that the capture of the brig Josefa Segunda, with a cargo of slaves, was made off Cape Tiberon, in the Island of St. Domingo, on the 11th of February, 1818, on a voyage to the Havanna, from the coast of Africa, which she had left in the preceding month of December or January. The capture was made by a Venezuelan brig, the General Arismendi. This vessel was commissioned as a privateer, by John Baptista Arismendi, who styled himself commanding General of Venezuela, and Captain General of the Island of Marguerita. The caption of the commission was, 'Republic of Venezuela;' and it purported to have been given in the Island of Marguerita, the 1st of February, in the year 1818, and to be sealed with the great seal of the State. At the time of capture, there were from two to three hundred slaves on board; some of these, but what number does not appear, afterwards died; others, but how many is not stated,

were sold at the Jardins de la Reine, on the south side of the Island of Cuba, in order to purchase provisions. Toward the end of the month of February, the prize master of the brig received written orders from the Captain of the privateer to conduct the prize to the Island of Marguerita ; and always steered, as he says, eastward, the winds being always ahead. The prize master had no log book on board ; he wrote every day's occurrences on | a slate, effacing what had been written the p. 342
day before. On the 18th of April, 1818, in the morning, the brig was boarded by a pilot, about 40 miles from the Balize, and arrived there at 4 o'clock, P. M. About 25 miles from the Balize, the brig fell in with the American ship Balize, from which no provisions were asked, but from whom he received six bags of rice. On the 24th of April, the brig was seized by the custom-house officers, and conducted to New-Orleans. On the 27th of April, 1818, Laporte, who was the agent of Beluche at New-Orleans, wrote a letter to the prize master of the brig, containing, among others, these expressions, ' Maintain always your declaration of being forced into port.'—' Take care that your sailors neither say, nor do any thing, which may prejudice the interest of Venezuela.' The privateer, after the capture of the brig, went to Jamaica for provisions. The pilot who first boarded the brig stated, that her mainmast was sprung, her ropes were all bad, the sails not fit to go to sea ; that they were pumping the last cask of water on board. Her spars were middling, except the mainmast ; there were no provisions on board—the men were in a state of starvation—that the slaves had nothing but skin upon their bones. A witness, who was on board in her passage up the river, stated that the brig sailed equal to any thing in the river—that he would not be afraid to make a voyage in her—her tackle, ropes, &c. were as good as usual—she was pumped out but once while he was on board—they carried topsails coming up—the spars were generally good. He saw nothing in the appearance of | the crew of their having been starved. p. 343
It also appeared that the agent of the claimants in New-Orleans, received letters from the owners of the brig sometime prior to her arrival at New-Orleans, and that one of the owners had arrived in that city, while this cause was depending, and before the 19th of June, 1818.

It was admitted by the claimant, that there existed an understanding between them and the captors ; that the former were to render to the latter a compensation for their not interposing any claim, which was so far ascertained, that the sum which the captors were to receive, was not to be less than six, nor more than eight thousand dollars, to depend on the expense and trouble incident to the prosecution, and the repairing of the vessel ; that this arrangement was made by the advice of the captor's counsel, from a conviction on his part, that they could not recover on account, as he conceived, of the illegality of the commission.

It was also admitted, that the claimants were the original owners of the brig and slaves on board.

On this testimony, the District Court condemned the brig, and effects found on board, to the United States, and the cause was brought by appeal to this Court.

March 9th.

Mr. *C. J. Ingersoll*, for the appellants and claimants, argued, 1. That the vessel was compelled by necessity to enter the Mississippi, and, therefore, was not liable to forfeiture under the acts of Congress for
p. 344 suppressing the slave trade. 2. That the commission | of General Arismendi, under which the original capture was made, was unlawful, he having no authority to issue it as Governor of the island of Marguerita, a dependent province of the new State of Venezuela. The owners were, therefore, entitled to restitution under the 9th article of the Spanish treaty of 1795, as well as under the general law of nations; the right of property not being changed by a piratical seizure.[1] 3. But supposing it to have been a regular capture in the exercise of the rights of war, and supposing the captors to have entered the waters of the United States with the intention of violating the acts of Congress, it is insisted, that the prize thus carried into a neutral port, before adjudication, cannot be forfeited *to the neutral State* for a breach of its municipal laws committed by the captors, without the consent or collusion of the original owners. It has been repeatedly determined, that when captures are made in violation of our neutral rights, as ascertained by the law of nations, the acts of Congress, and treaties with foreign powers, restitution of the captured property will be decreed by our tribunals to the original owners.[2] Why? Because it is the right as well as duty of the nation to prevent its neutral territory and resources from being used for the purposes of hostility by either belligerent. It will, therefore, restore in
p. 345 two cases: | First, where the capture is made within its territorial limits; and, secondly, when made by a vessel armed or re-equipped in its ports. The same principles apply where the captor violates the laws of police, or the revenue laws of the neutral State. The infringement of the one is as injurious to that State, and to the captured belligerent, as the infringement of the other. The injury to the original owner is equally great, whether the privateer was fitted in the neutral ports, or is permitted to carry his prizes into those ports for sale. The *spes recuperandi* is gone; and will the neutral sovereign condescend to avail himself, as against an innocent friend, of the forfeiture incurred by the misconduct of the enemy of the latter? The captor cannot sell; he cannot com-

[1] *Grotius, de J. B. ac P. l.* 3. *c.* 9. *s.* 17. *Bynk. Q. J. Pub. l.* 1. *c.* 17. *Valin, sur l'Ordon. l.* 3. *tit.* 9. *art.* 10. 2 *Bro. Civ. & Adm. Law*, 461.

[2] The Divina Pastora, 4 *Wheat.* 52. 55. and the cases cited in note. (*a*)

pletely devest the original owner of his remaining right to the captured property before its lawful condemnation: shall he then be permitted to do so by smuggling, or even by attempting, or barely intending to smuggle it in a neutral port? It is the well established doctrine of public law, that belligerents have no right to sell or dispose of their prizes in a neutral port, before they are judicially condemned in a competent Court of the captor's country; unless in case of necessity, or when the right is secured to them by treaty, or by the express permission of the neutral government; or in case of the intervention of peace.[1] If, then, the captor has not such an | interest in his uncondemned prize, p. 346
as will enable him to dispose of it by sale to another, how can he be said to have such an interest as will enable him to forfeit it to the neutral State for a breach of its municipal laws? This is a novel question, both here and in the European Courts of prize. It is indeed settled, that the Prize Court may dismiss the claim of a citizen, violating the law of his own country where the court sits; or of an ally or neutral violating the treaties between his own country and that of the Court; and that it may dismiss the libel of a captor (of the country where the Court sits,) for a collusive capture, or for a violation of the laws of trade. But the moment the neutral Court, in the present case, ascertained that this was a capture *jure belli*, or piratical, it had nothing to do but to restore it to the original possessor. The captor had not such a proprietary interest as rendered him capable of forfeiting it to the United States. The first case of a forfeiture in the Prize Court for a breach of municipal law, which is reported, is that of the Walsingham Packet:[2] that was the case of a British packet, retaken from the enemy, wherein a claim was given for the cargo as the property of British and Portuguese merchants, and resisted on the part of the captors, on the ground that such trade was prohibited by act of Parliament. Here the jurisdiction of the | Court, p. 347
with respect to the thing recaptured, was unquestionable; and Sir W. Scott rejected the claim on account of the claimants *own personal* misconduct, reserving the ultimate question, to whom the property should be condemned. In the case of the Etrusco,[3] it was subsequently determined, that condemnation in such cases should be, not to the captors, but to the crown. In the case of the Recovery,[4] Sir W. Scott determined, that the claim of a neutral could not be rejected in a Prize Court of the captor's country, for violating the municipal law of that country. Why? Because, as to him, it was a mere Court of the law of nations, though as to British subjects it was also a Court of municipal

[1] *Bee's Adm. Rep.* 263. The Flad Oyen, 1 *Rob.* 114. The Purissima Conception, 6 *Rob.* 45. The Schooner Sophie, *Ib.* 138. 2 *Bro. Civ. & Adm. Law*, 255. 1 *Peters' Adm. Dec.* 24. 2 *Peters' A. D.* 345. The Kierlighett, 3 *Rob.* 82. Wheelright v. Depeyster, 1 *Johns. Rep.* 471. 481. 2 *Valin, Com. Sur l'Ord.* 272. and *seq.* *Vattel, l.* 4. *c.* 2. *s.* 22. *Marten's Law of Nations*, 323. *Wheat. on Capt.* 262.

[2] 2 *Rob.* 64. [3] 4 *Rob.* 256. Note. [4] 6 *Rob.* 341.

law. As to him, the offence was merely *malum prohibitum;* as to British subjects, it was *malum in se:* and they had no right to complain if they were punished for it in any tribunal of their own country, however constituted. The cases of the Bothnea and the Jahnstaff,[1] and of the George,[2] in this Court, were also cases where the Court had undoubted prize jurisdiction, and the original owner being an enemy, could interpose no claim. The captor had been guilty of collusion with the public enemy, and had assisted him in violating the non-importation act. The Court, therefore, dismissed his libel, and condemned the property
p. 348 to the United | States. A similar observation is applicable to the case of the Venus,[3] in which the joint claim of a citizen, and an alien, to the vessel, was rejected, on the ground that the former had made a false oath, in order to obtain a register, whereby she became liable to forfeiture under the registry act. The District Court of Louisiana, beside its Circuit Court powers, may exercise jurisdiction as a Prize Court, or an Instance Court of Admiralty. In neither of these capacities could it take cognizance of the present case. Not as a Prize Court: for the jurisdiction belonged exclusively to the Venezuelan tribunals. Nor as an Instance Court of the law of nations: since, as such, its decree could only be for restitution to the captors or to the original owners, according as our neutrality had or had not been violated. Nor as an Instance Court of municipal law, could it condemn the captured property of a friend before it had been declared good prize by a competent prize tribunal; unless perhaps where the owner or his agent had subjected his property to such a forfeiture by an offence against the municipal law, consummated before the capture. The proper course of proceeding, where there is no collusion between the captor and the former owner, is to punish those captors who attempt to violate our municipal laws in the same manner as those who violate our neutrality; that is, by dispossessing them of their prizes, and restoring them to the original proprietors. Such was
p. 349 the conduct of Holland on a similar omission, as | stated by Bynkershoek.[4]

[1] 2 *Wheat.* 169. [2] *Ib.* 278. [3] 8 *Cranch*, 253.

[4] The passage of Bynkershoek here alluded to is as follows: He begins by observing: 'Although it be lawful, on national principles, to carry a prize into neutral territory, and there to sell it, if the captor thinks proper, laws have, nevertheless, more than once been made to the contrary.' He then proceeds: 'The States General, on the 9th of August, 1658, issued an edict, by which they ordered, that no foreign captor who might be compelled by stress of weather, or some other reasonable cause, to bring his prize into the ports of this country, should presume to sell any part of it, or even to break bulk, but that he should inform the bailiff of the place of his arrival, who, having placed a guard on board of the ship, should keep a strict watch over her, until her departure: inflicting, moreover, a discretionary penalty, and a fine of one thousand florins, on any one that should assist in unloading, or purchase any thing out of her. To which edict, the said States General, on the 7th of November, in the same year, enacted a supplement, by which it was ordered, that no prize ship should be brought into the port itself, but merely into the outer roads, where she might be sheltered from danger, and that nothing should be unladen or sold out of her; *and if any one should act to the contrary, the prize should be restored*

It is true, that he animadverts upon these ordinances of the States General; but his reflections will be found to be solely applicable to his own favourite notion of the right of belligerents to carry their prizes into neutral ports, and to | sell them there, which has long since been p. 350
exploded. The force of this historical example is not diminished by his criticism, founded, as it is, upon a false theory. In the case now before the Court, there can be no objection to restitution, on the ground of the traffic in which the original owners were engaged, being prohibited by the laws of their own country; for it is notorious, that Spain tolerates the trade. The principle, therefore, applied by the Lords of Appeal in England, to an American slave trader, in the case of the Amedie,[1] does not apply to this case. And Sir Wm. Scott, since the determination of the Lords, has decided, in the case of a Swedish vessel, that he would not condemn, because there was no positive proof, that Sweden had prohibited the trade, although it did not appear, that this State had ever sanctioned it, or that her subjects had been in the habit of carrying it on.[2] If it be said, that the condemnation rests on the act of Congress, and that this act is general in its terms, and makes no distinction as to the manner in which vessels violating the law may have been brought into our waters; it is answered, that, like all other penal laws, it must receive an equitable and liberal construction, and cannot be applied to cases of distress, or other cases of *vis major*.

The *Attorney General*, contra, argued principally upon the facts, to show, that the capture was collusive, | and that, consequently, the Court p. 351
had jurisdiction to condemn the property to the United States, in a case where the captor and captured had combined in a scheme of fraud to defeat the execution of our municipal laws. He insisted, that even if this were not the fact, that the captors had by possession, *jure belli*, such a title to the property as rendered it liable to confiscation for any breach of our laws by the captors. Their title could only be devested by recapture, or by the sentence of a competent prize Court of their own country; and how improbable it was that such Court would dispossess them of it, is shown by the proofs and the pleadings in this cause, by which it appears, that the property was Spanish, and, therefore, liable to condemnation in the Prize Courts of Venezuela. The establishment of a contrary doctrine by the Court, would furnish an effectual recipe by which all

to the former owner, as though it had never been taken, and the captor himself should be detained, and his own vessel seized and confiscated. The remainder of the edict merely confirms that of the 9th of August above mentioned. Whether those edicts were extorted from the States General by fear, or by any other cause, I do not know; but lest they should hereafter militate against national principles, we must declare, that we rather believe them to have been temporary than perpetual laws.' *Bynk. Q. J. Pub. L.* 1. *p.* 121. *of Mr. Duponceau's translation.*

[1] *Acton's Rep.* 240. *Edinburgh Rev. Vol.* 16. *No.* XXI. *p.* 436. *Wheat. on Capt.* 227.

[2] The Diana, *Dodson*, 95.

our laws of trade might be violated with impunity; since it would be extremely difficult in many cases to show, that the capture was collusive, and in case of detection in the attempt to smuggle, the claimant would have nothing to do but to throw the blame upon the pretended captor, whilst in case of success, he would reap the fruits which might attend it. However ingeniously contrived such a scheme might be, it was the duty of the Court to penetrate through it, and when detected, to visit it with the penalty of confiscation.

March 14th.

Mr. Justice LIVINGSTON delivered the opinion of the Court, and after stating the facts, proceeded as follows: The third count of the libel is
p. 352 the only one | that has any bearing on the present case. It alleges a violation of the seventh section of an act of Congress, prohibiting the importation of slaves into the United States, after the first day of January, in the year 1808, and which passed the 3d of March, 1807.

By this section it is enacted, 'That if any ship or vessel shall be found, from and after the first day of January, 1808, in any river, port, bay, or harbour, or on the high seas, within the jurisdictional limits of the United States, or hovering on the coast thereof, having on board any negro, mulatto, or person of colour, for the purpose of selling them as slaves, or with intent to land the same in any port or place within the jurisdiction of the United States, contrary to the prohibition of this act, every such ship or vessel, together with her tackle, apparel, and furniture, and the goods or effects which shall be found on board the same, shall be forfeited to the use of the United States, and may be seized, prosecuted, and condemned, in any Court of the United States having jurisdiction thereof. And the proceeds of all such ships and vessels, their tackle, apparel and furniture, and the goods and effects on board of them, which shall be so seized, prosecuted, and condemned, shall be divided equally between the United States and the officers and men who shall make such seizure, or bring the same into port for condemnation, and the same shall be distributed in like manner, as is provided by law for the distribution of prizes taken from an enemy: provided that the officers and men to be entitled to one half of the pro-
p. 353 ceeds aforesaid, | shall safe-keep every negro, mulatto, or person of colour, found on board of any ship or vessel so seized by them, and deliver them to such persons as shall be appointed by the respective States to receive the same,' &c.

It is not denied, that the brig Josefa Segunda, shortly before her seizure, had been hovering on the coast of the United States, having on board a large number of persons of the description of those whose importation into this country is prohibited by the act: nor can there

be any doubt, from the situation and circumstances under which she was found, and the manner in which she came within the jurisdictional limits of the United States, which appears to have been a voluntary act on the part of the prize master, that there is at least *prima facie* evidence of an intention to dispose of these people as slaves, or to land them in some port or place within the jurisdiction of the United States.

The claimants, aware of the necessity of accounting for circumstances, which, unexplained, could not but prove fatal to their interests, contend, in the first place, that the coming into the Mississippi was a matter of necessity, produced by the perilous situation of the vessel, and the famishing condition of the people on board: and that, therefore, neither she nor her cargo can be obnoxious to the provisions of the act of Congress. If the claim be not sustained on this plea; it is insisted,

In the next place, that the capture being illegal or piratical, the original owners cannot be affected by any of the acts of the prize crew; and, |

In the third place, it is asserted, that the vessel having been ransomed, p. 354
and taken out of the hands of the captors, the claimants are restored to all their original rights, unimpaired by any acts on the part of the former.

Each of these claims for restitution will now be examined.

When any act is done, which of itself, and unexplained, is a violation of law, and a party to extricate himself, or his property, from the consequences of it, resorts to the plea of necessity or distress, the burthen of proof is not only thrown upon him; but when the temptation to infringe the law is great, and the alleged necessity, if real, can be fully and easily established, no Court should be satisfied with any thing short of the most convincing and conclusive testimony. The proofs before us, are so far from being of this character, that we look in vain for testimony of any serious disaster having befallen this vessel in her voyage from the Island of Cuba, to the Mississippi,—or for a calamity of any kind, which might not have been averted or prevented, had the master seriously and honestly endeavoured to reach the Island of Marguerita, which is now pretended to have been her real port of destination. That neither he, nor his employer, should have any great solicitude for the arrival of the prize at Marguerita, is easily accounted for, when it is recollected that this island, as well from its small extent, being not more than forty miles in length, and perhaps not more than half as broad, as from the scantiness and poverty of its population, could afford but a wretched, if any market at all for slaves; while at New-Orleans, | each p. 355
of them would produce the extravagant and tempting sum of one thousand dollars. It has not escaped the observation of the Court, that the General Arismendi, made the passage from Marguerita to the place of capture

off the Island of St. Domingo, in the short space of nine days; for the owner's letter of instructions to the Captain bears date at Marguerita on the 2d day of February, 1818, and on the 11th of the same month, the capture was made; and yet with the important fact before us, it is seriously contended, that a voyage which had just been made in nine days, could not be performed back again in six weeks. This is a possible case; but we ought not to be expected on slight grounds to believe that a vessel after leaving the Island of Cuba, in the latter end of February, should, on the 18th of April following, be found, not only several miles farther from her destined port than at the time of sailing, but that she had pursued this circuitous route in search of provisions: a story so improbable could hardly, under any circumstance, be entitled to belief; but it becomes absolutely incredible, when so many ports, more contiguous, and where supplies might easily have been obtained, were passed in her way to the Balize, without a single effort to procure a supply at any of them. Why not go to Kingston, in Jamaica, which was in the neighbourhood of the place where the capture was made, and to which port, the privateer went after making the capture? Her not going there can be accounted for on no supposition other than that of her being
p. 356 well supplied | with provisions at the time of her leaving Cuba. It is vain then to urge a plea, which is contradicted by the internal evidence of the case. If, however, it can be made out, that an attempt were really made to reach Marguerita, which was frustrated by adverse winds, or by any one of those disasters which so frequently occur on the ocean, or that the Josefa was forced by stress of weather so very far from the track of a direct voyage to that island, the claimant might still contend, that their plea of necessity had been made out. But, on this subject, there is an impenetrable obscurity, which it was their duty to remove. What winds, or what weather were encountered, we are not informed. No log book, from which alone, accurate and safe knowledge might be derived, is produced. A journal of that kind was not even kept, a circumstance which, of itself, excites a suspicion, which none of the testimony in the cause is calculated to dispel. But it is not necessary to pursue this inquiry farther, or to take notice of several minor circumstances which are relied on, and which so far from making out a case of real distress, only serve to confirm the view which has already been taken of the other evidence, and leave no reasonable doubt of the whole story being a fiction; or that the want of provisions, if real, at the time of seizure, was produced by a voluntary protraction of the voyage for the purpose, and with the intent of violating the law on which the present libel is founded. If, on testimony so vague, so contradictory, and affording so little satisfaction, this Court should award restitution, all
p. 357 the acts of Congress which | have been passed to prohibit the importation

of slaves into the United States, may as well be expunged from the statute book; and this inhuman traffic, for the abolition of which the United States have manifested an early and honourable anxiety, might, under the most frivolous pretexts, be carried on, not only with impunity, but with a profit which would keep in constant excitement the cupidity of those who think it no crime to engage in this unrighteous commerce. In the execution of these laws, no vigilance can be excessive, and restitution ought never to be made, but in cases which are purged of every intentional violation, by proofs the most clear, the most explicit and unequivocal.

But the claimants, not relying exclusively on the plea of necessity, contend, that the capture being piratical, and by a vessel having no commission, they ought not to be injured by any acts of the prize master which may be deemed infractions of the laws of the United States.

It would, indeed, be unreasonable and unjust, to visit upon the innocent owners of this property, the sins of a pirate; and were this allegation made out, the Court would find no difficulty in making the restitution which is asked for. But is it so; was the General Arismendi a piratical cruizer? The Court thinks not. Among the exhibits is a copy of a commission, which is all that, in such a case, can be expected, which appears to have been issued under the authority of the republic of Venezuela. This republic is composed of the inhabitants of a portion of the dominions of Spain in South America, who have | been for sometime past, p. 358
and still are, maintaining a contest for independence with the mother country. Although not acknowledged by our government as an independent nation, it is well known that open war exists between them and his Catholic Majesty, in which the United States maintain strict neutrality. In this state of things, this Court cannot but respect the belligerent rights of both parties; and does not treat as pirates, the cruizers of either, so long as they act under, and within the scope of their respective commissions. This capture, then, having been made under a regular commission of the government of Venezuela, the captors acquired thereby a title to the vessel and cargo, which could only be devested by recapture, or by the sentence of a Prize Court of the country under whose commission the capture was made. The Courts of neutral nations have no right to interfere, except in cases which do not embrace the present capture. The captors, therefore, at the time of the violation of our laws, must be regarded as the lawful owners of the property, and as capable of working a forfeiture of it, by any infraction on their part of the municipal regulations of the United States. The property, in the present case, not only belonged, at the time, to the captors, in virtue of the capture which they had made, but it is evident from the testimony and admissions in this cause, that it was owned at the time of capture

by an enemy, and that a condemnation in a Prize Court of Venezuela was inevitable.

As little foundation is there for resting a claim to restitution on the
p. 359 ransom, which it is alleged took | place, of this vessel and cargo. This ransom, whether real or pretended, whether absolute or contingent, (about which, doubts may well be entertained,) cannot affect the rights of the United States. The forfeiture having attached before any ransom took place, could not be devested by any act between parties, conusant as these were, not only of the fact that a seizure had taken place for a violation of law, but that legal proceedings had been instituted, and were then carrying on, to obtain a sentence of condemnation founded on such violation.

Decree affirmed, with costs.

La Amistad de Rues.—Almiral, libellant.

(5 Wheaton, 385) 1820.

Quære, Whether, where a prize has been taken by a privateer fitted out in violation of our neutrality, the vessels of the United States have a right to recapture the prize and bring it into our ports for adjudication ?

In cases of marine torts, the probable profits of a voyage are not a fit rule for the ascertainment of damages.

In cases of violation of our neutrality by any of the belligerents, if the prize comes *voluntarily* within our territory, it is restored to the original owners by our Courts. But their jurisdiction for this purpose, under the law of nations, extends only to restitution of the specific property, with costs and expenses, during the pendency of the suit, and does not extend to the infliction of vindictive damages as in ordinary cases of marine torts.

Where the original owner seeks for restitution in our Courts upon the ground of a violation of our neutrality by the captors, the *onus probandi* rests upon him, and if there be reasonable doubt respecting the facts, the Court will decline to exercise its jurisdiction.

Appeal from the District Court of Louisiana. |

p. 386 This was the case of a Spanish ship captured by the Venezuelan privateer La Guerriere, on the high seas, in November, 1817, and afterwards forcibly taken possession of near the mouth of the Mississippi, by a detachment from the United States ketch Surprise, and brought into the port of New-Orleans. A libel was there filed in the District Court, in behalf of the original Spanish owners, claiming restitution of the property, upon the ground, (among other things,) that the privateer had augmented her crew in the United States, during the cruise, and before the capture. A claim was given in by the original captors, denying the allegations in the libel, and praying restitution of the property as lawfully captured. At the hearing in the District Court, the cause

turned almost entirely upon the question of the augmentation of the crew, and the Court decreed restitution of the property to the original Spanish owners with damages, which were ordered to be ascertained by assessors. The assessors reported damages as follows: to the owners of the ship for loss by plunder, $625 00
and to the owners of the cargo for loss of market by the capture, 4000 00
and loss by plunder, 575 00

in the whole, $5,200 00

The report was confirmed by the Court, and damages decreed accordingly. From this decree, the captors appealed to this Court. |

March 8th. p. 387

Mr. *C. J. Ingersoll*, for the appellants, argued upon the facts, to show that there was no sufficient evidence to prove that the privateer had augmented her force in the ports of the United States. He insisted, that the burthen of proof to establish this fact rested with the original Spanish owners, who claimed restitution upon it; and that they had not shown, beyond all reasonable doubt, to the satisfaction of the Court, that the captors had increased their armament in violation of our neutrality. He also argued, that supposing the misconduct on the part of the captors ever so clearly established by the evidence, the jurisdiction of our Courts does not extend to the infliction of vindictive damages for their offence, but is limited by the law of nations to restitution of the specific property illegally captured. To carry it further, would be to assume the entire prize jurisdiction with all its incidents, which is exclusively vested in the Courts of the captor's country. At all events, it is well established, that the probable profits of a voyage is not a fit rule for the assessment of damages in cases of marine torts, and even upon that ground alone the decree must be reversed.

The *Attorney-General*, contra, insisted, that the evidence of an illegal augmentation of the force of the privateer in our ports, was sufficiently established by the evidence. He argued, that where the neutrality of our ports is violated in this manner, and the property captured is brought within our territory, the Courts of this country, proceeding *in rem*, are bound not merely to restore the specific property | to the original owners, p. 388 but to restore it with costs and damages, as in an ordinary case of illegal seizure. Being possessed of the principal question of prize or no prize, that necessarily draws after it all incidental questions; and the one is no more an invasion of the exclusive jurisdiction of the belligerent Prize Courts than the other. The neutral tribunal having taken jurisdiction for the purpose of vindicating the neutrality of its own country, by placing things in the same state they would have been in, had not that

neutrality been violated,—can only do complete justice between the parties, by inflicting upon the captors such damages as will afford the original owners an indemnity for the loss they have sustained.

March 14th.

Mr. Justice STORY delivered the opinion of the Court, and, after stating the facts, proceeded as follows. We pass over the question, whether, supposing there was an illegal augmentation of the crew of the privateer in our ports, the American captors had any right forcibly to bring in the prize for adjudication. It is an important question, and when it shall be necessary to decide it, it will deserve serious consideration. The present cause may well be disposed of without any discussion concerning it.

Two questions have been made at the bar. 1. Whether, in point of fact, the illegal augmentation of the crew is so established as to entitle the Spanish libellants to restitution. 2. If so, whether the damages were rightfully awarded. |

p. 389 The last question will be first considered. And as to the item of damages for loss of market, we are all of opinion that it is clearly inadmissible. In cases of marine torts, this Court have deliberately settled, that the probable profits of a voyage are not a fit mode for the ascertainment of damages.[1] It is considered that the rule is too uncertain in its own nature, and too limited in its applicability, to entitle it to judicial sanction. The same principle must govern in the present case.

But a more general objection is to the allowance of any damages in cases of this sort, as between the belligerents. The doctrine heretofore asserted in this Court is, that whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This is done upon the footing of the general law of nations; and the doctrine is fully recognised by the act of Congress of 1794. But this Court have never yet been understood to carry their jurisdiction, in cases of violation of neutrality, beyond the authority to decree restitution of the specific property, with the costs and expenses during the pending of the judicial proceedings. We are now called upon to give general damages for plunderage, and if the particular circumstances of any case shall hereafter require it, we may be called upon to inflict exemplary damages to the same extent as in the ordinary cases of marine torts. We entirely disclaim

p. 390 any right to inflict such | damages; and consider it no part of the duty of a neutral nation to interpose, upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents. Strictly speaking, there can be no such

[1] The Amiable Nancy, 3 *Wheat.* 546.

thing as a marine tort between the belligerents. Each has an undoubted right to exercise all the rights of war against the other; and it cannot be a matter of *judicial* complaint, that they are exercised with severity, even if the parties do transcend those rules which the customary laws of war justify. At least, they have never been held within the cognizance of the prize tribunals of neutral nations. The captors are amenable to their own Government exclusively, for any excess or irregularity in their proceedings; and a neutral nation ought no otherwise to interfere, than to prevent captors from obtaining any unjust advantage by a violation of its neutral jurisdiction. Neutral nations may, indeed, inflict pecuniary, or other penalties, on the parties for any such violation; but it then does it professedly in vindication of its own rights, and not by way of compensation to the captured. When called upon by either of the belligerents to act in such cases, all that justice seems to require is, that the neutral nation should fairly execute its own laws, and give no asylum to the property unjustly captured. It is bound, therefore, to restore the property if found within its own ports; but beyond this it is not obliged to interpose between the belligerents. If indeed it were otherwise, there would be no end to the difficulties and embarrassments of neutral prize | tribunals. They would be compelled to decide in every p. 391
variety of shape upon marine trespasses *in rem*, and *in personam*, between belligerents, without possessing adequate means of ascertaining the real facts, or of compelling the attendance of foreign witnesses; and thus they would draw within their jurisdiction almost every incident of prize. Such a course of things would necessarily create irritations and animosities, and very soon embark neutral nations in all the controversies and hostilities of the conflicting parties. Considerations of public policy come therefore in aid of what we consider the law of nations on this subject; and we may add, that Congress in its legislation has never passed the limit which is here marked out. Until Congress shall choose to prescribe a different rule, this Court will, in cases of this nature, confine itself to the exercise of the simple authority to decree restitution, and decline all inquiries into questions of damages for asserted wrongs. The decree for damages is, therefore, unhesitatingly reversed.

The other question presents more difficulty. It must be admitted, that there is positive testimony directly to the point of the illegal augmentation of the crew of the privateer; and if it stood uncontradicted, and were liable to no deduction, the libellant would certainly be entitled to restitution. But the testimony as to the augmentation, comes chiefly from very obscure persons, and is, in itself, in many respects, loose and equivocal; and that of one, at least, of the principal witnesses, is, in a most material fact, | directly contradicted by a written document, p. 392
whose verity has not been questioned. It is proved, by the report of

an inspector made to the custom house, that at the arrival of the privateer in port, she had on board 49 men ; yet, the witness alluded to, expressly alleges, that at the time of her arrival at New-Orleans, she had not more than ten or twelve persons on board. It appears, too, that the crew of the privateer was wholly composed of foreigners, principally persons from the Spanish Maine, and from St. Domingo. Being arrived at New-Orleans in the course of a cruize, which is not proved to have ended there, the natural presumption is, that her original crew continued attached to her ; and this presumption is considerably fortified by the fact, that though the officers of the custom house of that port vigilantly inquire into cases of this nature, there is nothing in their testimony, that in the slightest degree affects the conduct of the privateer in an unfavourable manner. It certainly cannot be said, that the evidence is free from all reasonable doubt. And, in cases of this nature, where the libellant seeks the aid of a neutral Court to interpose itself against a belligerent capture, on account of a supposed violation of neutrality, we think the burthen of proof rests upon him. To justify a restitution to the original owners, the violation of neutrality should be clearly made out. If it remains doubtful, the Court ought to decline the exercise of its jurisdiction, and leave the property where it finds it. We cannot
p. 393 say that the present case is clear from reasonable doubt ; and, | therefore, we reverse the decree of the District Court, and order restitution to be made to the original captors ; but, under all the circumstances, the parties are to bear their own costs.

Decree reversed.

DECREE. This cause came on to be heard on the transcript of the record of the District Court of the United States for the district of Louisiana, and was argued by counsel. On consideration whereof, it is DECREED and ORDERED, that the decree of the said District Court, in this case, be, and the same is, hereby reversed and annulled. And this Court, proceeding to pass such decree as the said District Court should have passed, it is further DECREED and ORDERED, that the libel be dismissed, and the said ship La Amistad, her tackle, apparel, and furniture, and cargo, be restored to the claimants. And it is further ORDERED, that each party pay their own costs.

The Amiable Isabella.—Munos, claimant.

(6 Wheaton, 1) 1821.

Whether the capture is made by a duly commissioned captor, or not, is a question between the Government and the captor, with which the claimant has nothing to do.

If the capture be made by a non-commissioned captor, the Government may contest the right of the captor after a decree of condemnation, and before a distribution of the prize proceeds; and the condemnation must be to the Government.

The 17th article of the Spanish treaty of 1795, so far as it purports to give any effect to passports, is imperfect and inoperative, in consequence of the omission to annex the form of passport to the treaty.

Quære—Whether, if the form had been annexed, and the passport were obtained by fraud and upon false suggestions, it would have the conclusive effect attributed to it by the treaty?

Quære—Whether sailing under enemy's convoy be a substantive cause of condemnation?

By the Spanish treaty of 1795, *free ships make free goods;* but the form of the passport, by which the freedom of the ship was to have been conclusively established, never having been duly annexed to the treaty, the proprietary interest of the *ship* is to | be proved according to the ordinary rules of the Prize p. 2
Court, and if thus shewn to be Spanish, will protect the *cargo* on board, to whomsoever the latter may belong.

By the rules of the Prize Court, the *onus probandi* of a neutral interest rests on the claimant.

The evidence to acquit or condemn, must come, in the first instance, from the ship's papers, and the examination of the captured persons.

Where these are not satisfactory, farther proof may be admitted, if the claimant has not forfeited his right to it by a breach of good faith.

On the production of farther proof, if the neutrality of the property is not established beyond reasonable doubt, condemnation follows.

The assertion of a false claim, in whole or in part, by an agent, or in connivance with the real owner, is a substantive cause of condemnation.

APPEAL from the Circuit Court of North Carolina.

This was the case of a ship and cargo, sailing under Spanish colours, and captured by the privateer Roger, Quarles, master,[1] on an ostensible

[1] As the form of the commission issued to the privateer, in this case, is one of the points discussed in the argument, it is thought necessary to insert it.

James Madison, President of the United States of America, to all who shall see these presents, greeting:

Be it known, that in pursuance of an act of Congress, passed on the 26th day of June, one thousand eight hundred and twelve, I have commissioned, and by these presents do commission, the private armed schooner called the Roger, of the burthen of 184 tons, or thereabouts, owned by Thomas E. Gary, Hy. Gary, James B. Cogbill & Co., Brogg & Jones, Hannon & High, Robert Ritchie, Robert Birchett, John Wright, Wm. C. Boswell, Samuel Turner, John G. Heslop, Wm. & Charles Carling, Thomas Shoe, Richard B. Butte, Richard Drummond, Littlebury Estambuck, John Davis, Spencer Drummond, Peter Nestell, and Roger Quarles, mounting

p. 3 voyage | from Havana to Hamburg, but really destined for London, *or* with an alternative destination, and orders to touch in England for information as to markets, and further instructions. The ship sailed
p. 4 from the Havana, on the 24th of November, 1814, under | convoy of the British frigate Ister, with which she parted company on the 1st of December, the frigate having gone in chace of an American privateer; and on the 3d of December, was captured by the privateer Roger, and carried into Wilmington, North Carolina, for adjudication. The ship and cargo were condemned as prize of war in the District Court of North Carolina, and the sentence was, after the admission of farther proof in the Circuit Court, affirmed by that Court. An appeal was then allowed to this Court, with permission to introduce new proof here, if this Court should choose to receive it.

The original evidence consisted of the papers found on board the captured vessel, and delivered up to the captors, by the master, at the time of the capture; and of certain other documents afterwards found concealed on board, or in the possession of Rahlives, the supercargo, or of one Masuco, *alias* Burr, a passenger on board the Isabella. Some of the ship's papers were mutilated, and attempted to be destroyed, and others were thrown overboard, and spoliated.

The paper of which the following is a translation, was the only one delivered up by the master, at the time of the capture: 'Don Jose Sedano, Administrator General of the Royal Revenues of this port of Havana, in the island of Cuba, &c. certify that by authority and knowledge of the General Administrator of the Revenues under my charge,

fourteen carriage guns, and navigated by ninety men, hereby authorizing Captain ——, and John Davis, Lieutenant of the said Schooner Roger, and the other officers and crew thereof, to subdue, seize, and take any armed or unarmed British vessel, public or private, which shall be found in the jurisdictional limits of the United States, or elsewhere, on the high seas, or within the waters of the British dominions; and such captured vessel, with her apparel, guns and appurtenances, and the goods or effects which shall be found on board the same, together with all the British persons and others, who shall be found acting on board, to bring within some port of the United States; and also to retake any vessels, goods, and effects, of the people of the United States, which may have been captured by any British armed vessels, in order that proceedings may be had concerning such capture or recapture, in due form of law, and as to right and justice shall appertain. The said is further authorized to detain, seize, and take all vessels and effects, to whomsoever belonging, which shall be liable thereto, according to the law of nations, and the rights of the United States, as a power at war, and to bring the same within some port of the United States, in order that due proceedings may be had thereon—this commission to continue in force during the pleasure of the President of the United States, for the time being.

Given under my hand, and the seal of the United States of America, at the City of Washington, the 24th day of April, in the year of our Lord one thousand eight hundred and thirteen, and of the Independence of the said States the thirty-seventh.

(Signed) JAMES MADISON.

By the President,

(Signed) JAMES MONROE, Secretary of State.

permission has been given to ship in the Spanish ship called the *Isabel*, Captain Don Francisco Cacho, with destination for Hamburg, viz. : |

Don Alonzo Benigno Munos, registered on the day p. 5
of this date, six hundred and seventy-six boxes brown
M 1 a 676 sugar, two hundred and twenty-eight boxes white ditto,
M + 201 a 228 and two hundred quintals dye-wood, which he has
.. 1 a 40 shipped on his own account and risk, consigned to Don
Juan Carlos Rahlives, and paid 6290, and that it may
so appear, I sign the present.

(Signed) SEDANO.'

Havana, 10th Nov. 1814.

Among the papers found on board, and brought into the Registry, with an explanation of the circumstances under which they were discovered, were,

(1.) A passport or license granted by the Governor and Captain General of the island of Cuba, of which the following is a translation :

Number 94.

PROVINCE OF THE HAVANA.

Don Juan Ruiz de Apodaca y Eliza, President, Governor, Captain General of the place of Havana, and island of Cuba, Commandant General of the Naval Forces of the Apostedero, &c. &c.

For want of royal passports, I despatch this document in favour of Captain Don Francisco Cacho, inhabitant of the city of Havana, that with his Spanish | merchant ship called *Amable Isabel*, of the burthen of p. 6
208½ tons, he may sail from this port, with cargo and register of free trade, and proceed to that of Hamburg, there to trade, and return to his port of departure, with the express condition of performing his voyage outward and inward, directly to the fixed places of his destination, without deviating, or touching at any port, national or foreign, in the islands or continent of the Indies, unless compelled by inevitable accident.

Gratis. (Signed) APODACA.

Sebastian de la Cadena.[1] |

[1] The original of this passport, or license, is as follows :

Numero 94.

PROVINCIA DE LA HABANA.

D. Juan Ruiz de Apodaca y Eliza, Presidente, Gobernador, Capitan Generál, be la plaza de la Habana, é Isla de Cuba, y Comandante Generál de Marina del Apostadero, &c. &c.

A' falta de Reales Pasaportes expido este documento á favor del Capitan Dn. Franc. Cacho Vecino de esta Ciudad de la Habana para que con su Fragata mercantile Española nombada Amable Ysabel de porte

p. 7 (2.) A clearance granted by Don Pedro Acevido, captain of the port of Havana, permitting the said Cacho ' to proceed with the Spanish ship *La Amable Isabel,* from this port to England,' with a muster roll of the officers and crew annexed. (3.) A letter of instructions from Munos, the claimant, to Cacho, of which the following is a translation :

Havana, 10th Nov. 1814.

' *Don Francisco Cacho.*

' SIR,

' Intrusted as you are with my ship *La Amable Isabel,* which sails bound for Hamburg, or some other port of that continent, or for those of England, I hope that you will perform your duty with the exactness you have always used, and which was my motive for making choice of you. Consequently I will omit all further advice, particularly as there goes in the vessel the supercargo, Don Juan Rahlives, with my full power and instructions. You will observe all his directions as if they were dictated by myself. Wishing you a prosperous voyage, &c.

(Signed) MUNOS.

(4.) Articles of agreement between Munos and the master and crew of the ship. (5.) A general procuration from Munos to one Von Harten of London, dated at Havana, May 29th, 1812, with a substitution by the latter to Rahlives the supercargo, executed at London. (6.) A letter from one Tieson, dated London, November 4th, 1813, to his brother
p. 8 F. Tieson, at Rio Janiero, introducing Rahlives, | as the conductor of certain commercial operations, which he had concerted with several friends, referring his correspondent to Rahlives himself for the details. (7.) A letter from one Rhodes, dated London, to Messrs. Glover & Co. at Rio Janeiro, introducing Rahlives, who the writer states ' goes as supercargo in the ship Isis, and acts for Mr. John Goble of Havana, and Mr. Von Harten of London,' &c. (8.) A letter from Hawkes & Malloret, dated Liverpool, October 28th, 1803, to Brown & Co., at Rio Janeiro, introducing Rahlives as ' particularly connected with our intimate and respectable friend Mr. George Von Harten of London, and John Gobel of Havana, on whose behalf he will probably visit you very shortly. It is probable Mr. Rahlives may entrust to your management some

de 208½ toneladas, pueda salîr de este Puerto, con carga y registro del libre comercio, y transferirse al de Hamburgo para comerciar en el, y restituirse al de su salida con expresà condicion, de hacer su derrota de ida y vuelta directamente à los senalados parages de su destino sin extraviarse ni hacer arribada à Puertos nacionales, ó extrangeros, en islas, ó tierra firme de Indias á menos de verse obligado de accidentes de otra suerte no remediables. Habana, diez de Novembre de mil ochocientoz catorze.

Gratis. (Signed) APODACA.

SEBASTIAN DE LA CADENA.

transactions for account of said friends, and others, and we beg to assure you we feel convinced every satisfaction will result from such business as he may have to conduct.' (9.) The following circular: 'Havana, 1st May, 1812. On the 15th last May, we took the liberty of addressing our friends from London, requesting their countenance to an establishment we intended to form in this city under the firm of Von Harten, Gobel & Co. We now have the satisfaction to inform you of our complete success in organizing and consolidating the same, and that we are in every respect enabled to procure to our correspondents all those advantages which may result from intelligence, activity, and the most respectable connections in this island. Political considerations, however, induce us to carry on our affairs for the future under the sole | name and p. 9
firm of Mr. John Gobel, who is permanently to reside in this country,' &c. (10.) An account of sales, dated Havana, November 16th, 1814, signed by J. Gobel, of the cargo of the English brig Portsea, received from Rio de Janeiro, on account of Messrs. Brown, Weston & Co. and of Rahlives, amounting to 20,313 dollars net proceeds, leaving to the credit of Rahlives, in Gobel's hands, half of that sum. (11.) A charter party, executed at Rio de Janeiro, May 11th, 1814, between Weston and Gobel, letting to him the Portsea, and consigning the cargo to the charterer. (12.) The following letter from Munos to Rahlives: 'Havana, 10th Nov. 1814. Sir, I enclose you invoice and bill of lading shewing to have shipped in my ship called *La Amable Isabel*, Capt. Don Francisco Cacho, 1,104 boxes of sugar, and 40 half boxes of ditto, and 200 quintals of dye-wood, the principal amount of which and charges amounts to $60,642 3, which cargo consigned to you, you will please to take charge of on your arrival at Hamburg, or at any other port you may find convenient to go, proceeding to sell it on the most advantageous terms you can obtain, that with the proceeds you may make the returns according to the instructions I have verbally communicated to you. In like manner I recommend to you, and place under your care, my said vessel, in order that the adventure may have the most favourable termination, to which end I have given definitive orders to the Captain, Don Francisco Cacho, that he may observe the instructions you may communicate to him in my name. As I am so well satisfied with | your care and diligence, and the friendship my house p. 10
entertains for you, I shall omit any further advice, wishing you a prosperous voyage, and that you may duly advise me of your proceedings, and communicate such instructions as you may think fit. Yours, &c.' (13.) A bill of lading signed by the master, Cacho, acknowledging the receipt of the cargo, and engaging to deliver it to Rahlives at Hamburg, or at the port where his register might be verified. (14.) A manifest, entitled 'Manifest of the cargo of the Spanish ship *La Amable Isabel*, in its voyage from this port of Havana to that of London;' and signed

by the master ; being stated in the margin that he had signed bills of lading therefor ' to Don Alonzo Benigno Munos, which he has registered on his own account and risk, and to the consignment of Horace Solly of London.'

Among the mutilated papers found on board were, (1.) various accounts between Rahlives and F. Thieson. (2.) An invoice of jerked beef and tallow, shipped from Rio de Janeiro to Havana. (3.) Another invoice of the same, ' for account and risk of Mr. Alonzo Benigno Munos at Havana,' per brig Isis, Capt. Brenmer, amounting to 22,371 dollars. (4.) Invoice of sugars, &c. shipped on board the Isis at Havana by order of Rahlives, signed by Gobel, and amounting to 50,671 dollars. (5.) Another invoice of the same, shipped on board the Isis, ' for Falmouth and a market, to the orders of G. Van Harten, Esq. in London,' signed by Rahlives, and various accounts between the different parties. |

p. 11 A claim was given in for the ship and cargo, as the property of Don Alonzo Benigno Munos, by Rahlives, the supercargo, as agent for the alleged owner ; and the captured persons were examined on the standing interrogatories.

Upon the order for farther proof, the affidavits of the claimant and his clerks, to the proprietary interest of the ship and cargo, in him, were produced, and the proceedings before the tribunal of the Consulado, at the Havana, under which the ship, which had arrived at that port from New-Providence, was sold under the bottomry bond alleged to be given for repairs by one John Cook, to the claimant, and was naturalized as a Spanish vessel. A great mass of testimony was also produced, tending, (among other things,) to show that the claimant, who was father-in-law of Gobel, had not been actively engaged in trade for many years before this shipment was made ; and that Gobel, not being a Spanish subject, all his foreign business, and his transactions with the custom house, had constantly been carried on in the name of Munos.

Mr. *Gaston*, for the appellant and claimant, argued, 1. that the prize allegation, in this case, ought to be dismissed, because the libellants had shown no lawful authority to make the capture in question, and, therefore, condemnation could not be pronounced in favour of the captors ; but, even if the proprietary interest were proved to be enemy's, it must be condemned as a droit of admiralty to the use of the government. It is

p. 12 a well established principle | of the law of prize, that the captors must show an authority to capture as prize, and exhibit their title deeds.[1] Here the commission is issued to the vessel itself, without naming the commander who is to direct her operations as a cruizer. The commander, by whom the seizure was actually made, had no commission or authority whatever, other than what was delegated to him by the owners of the

[1] The Melomasne, 5 *Rob.* 43.

vessel. The capture is, therefore, null, so far as respects the captors. On general principles, no persons can rightfully carry on war but those who have a particular authority from the sovereign power of the state. With regard to private armed vessels, unless they have a public commission, their acts are absolutely unlawful, and all on board may be treated as pirates.[1] At all events, they can derive no title under captures thus made, unless they have a commission. *In bello parta cedunt rœipublicæ;* and all the rights of prize are derived from the grant of the sovereign power. Nor can the commission be issued to the inanimate machine. It must be to the organized association of human beings who are to control and direct its force. Without a head to control and govern them, such an association would be nothing but a band of pirates. The interests of mankind will not tolerate the existence of such a monster as a ship of war without a lawful commander. Even when thus governed, they require to be watched with vigilance, and controlled by the government, lest they involve the nation with its allies, | or with neutrals.[2] For this purpose it is p. 13
necessary that the government should designate and commission their officers. So strict is the doctrine of the Court of Admiralty on this subject, that a capture made by a public commissioned ship, the commander not being on board at the time, is regarded as if made without a commission.[3] So, also, by our own law, the act declaring war, June 18th, 1812, c. 425., authorises the President to issue commissions or letters of marque and reprisal, in such form as he shall think proper to dictate : and in the form which he has actually prescribed, the names of the captain and lieutenant are required to be inserted. The Prize Act of June 26th, 1812, c. 430., imposes very strict duties upon the commander, which he is to perform personally, and cannot devolve upon another. He is, among other things, to give bond, and is made responsible for his own misconduct and that of the crew ; is to receive and execute the President's instructions ; is to keep a journal of the ship's transactions ; and by his personal negligence or misconduct, may forfeit the commission, and the rights of prize derived under it. Most clearly the Government has a right to judge of the merits and qualifications of the person to be invested with a trust so high and important. But the Government has not delegated it to the captors, in the present case, and, therefore, they have no right to demand condemnation to their use. Nor has the Government itself | interposed ; nor, p. 14
indeed, can it interpose, to require condemnation to its own use, until the preliminary question of prize or no prize is determined, and the Court is about to distribute the proceeds.[4] No final decree of condemnation can, therefore, now be pronounced.

[1] *Vattel, Droit des Gens, l.* 3. *c.* 15. *s.* 226.
[2] The Thomas Gibbons, 8 *Cranch*, 421.
[3] The Charlotte, 5 *Rob.* 251.
[4] The Thomas Gibbons, 8 *Cranch*, 421.

2. The testimony furnished by the papers found on board the captured vessel, is such, as, according to the treaty between the United States and Spain of 1795, is conclusive on the question, and entitles the claimant to immediate restitution. This treaty forms a conventional law on the subject of neutral commerce, essentially different from the general law on the same subject.[1] By the 15th article it is stipulated, that the ships of either nation may sail from any port to those of a country which may be at war with either or both nations, and may go to neutral places, or to other enemy ports; and that every article on board, except contraband, to whomsoever belonging, shall be free. In order to carry into effect this stipulation for the unlimited liberty of commerce, and that free ships shall make free goods, it is provided by the 17th article, that the vessel shall be furnished with a passport expressing her national character, and with certificates to show, that the cargo is not contraband. To this passport a conclusive effect is attributed. It establishes the national
p. 15 character of the ship; and that being proved, | renders it immaterial to inquire respecting the cargo, except so far as to ascertain by the certificate, that it is not contraband. The 18th article requires the cruisers of either party, meeting the merchant vessels of the other upon the high seas, to remain out of cannon shot, and only authorises them to send on board two or three men, and if the passport be exhibited, the vessel is not to be molested; and by the 17th article, if the prescribed documents are not exhibited, she may be sent in for adjudication, and condemned as prize, unless *testimony* entirely *equivalent* shall be produced. The ship now in question, was furnished with such a passport and certificate as the treaty prescribes. It is true, that the *form* of passport, intended to have been annexed to the treaty, never was, in fact, annexed by the negociators, owing to accident or negligence, or some other cause which we cannot now explain. We are not, however, without the means of ascertaining what will satisfy the requisitions of the treaty. A passport, or sea letter, is a well known document in the usage of maritime commerce, and is defined to be a permission from a neutral State to the master of a ship to proceed on his proposed voyage, usually containing his name and residence, and the name, property, tonnage, and destination of the ship.[2] Although it evidences the permission of the State to navigate the seas, yet it does not, therefore, follow, that it must issue directly from the supreme power |
p. 16 of the State; and some authority ought to be shown to support such a position. This erroneous notion, probably, arises from the practice of our own country, which is different from that of all other nations. Previous to the year 1793, no other documents were furnished to the merchant vessels of the United States but the certificate of registry and clearance;

[1] For the provisions of this treaty, *vide* 6 *Wheaton*, APPENDIX, Note No. 1.
[2] *Marshall on Ins.* 406.

but the depredations upon our commerce having commenced with the European war which broke out in that year, a form of sea letter was devised, and to give it greater effect, was signed by the President. On the 28th of November, 1795, a treaty was made with Algiers, by which a passport was to protect our vessels from capture by Algerine cruisers. By the act of the 1st of June, 1796, c. 339. Congress authorised the Secretary of State to prepare a form, which, when approved by the President, should be the form of the passport. Neither the treaty nor the law required the President's signature, but the form prepared was signed by the President, as the sea letter had been. But this, our peculiar practice, forms no rule of conduct obligatory on others; and will not authorize us to give a more restricted meaning to the term used in a treaty than the general usage of nations will warrant. The word *passport*,[1] thus used, is taken from the same word, signifying a permission given to individuals to remove from one | place to another, and the documents are p. 17
analogous. Vattel states, that, 'like every other act of supreme cognizance, all safe-conducts or passports flow from the sovereign authority; but the Prince may delegate to his officers the power of furnishing them, and with this they are invested, either by express commission, or in consequence of the nature of their functions. A General of an army, from the nature of his post, can grant them; and as they are derived, though mediately, from the same Prince, all his generals are bound to respect them.'[2] So, also, Blackstone speaks of the offence of violating passports, or safe-conducts, granted by the King *or his Ambassadors*.'[3] It is then incidental to the commission of an Admiral or General, or public Minister, to issue these documents of protection for persons or property.[4] By the usage of all commercial countries, they are issued by the superior officers superintending the marine affairs of the kingdom, province, city, or colony, where granted, and as representing the Sovereign in those places. In France, they have always been issued by the Admiral of France, except during the revolution, when they were issued by the Minister of Marine.[5] | In the King of Prussia's ordinance of neutrality, passports and sea-letters p. 18
are spoken of as issuing from Admiralties, Maritime Colleges, or magistrates of cities.[6] And in the celebrated answer to the Prussian *Exposition des Motifs*, it is said, that until the year 1746, the usual document was a certificate from the Admiralty that the ship was Prussian. Afterwards

[1] '*Passaporte. Passeport.* Lettre ou brevet d'un prince ou d'un commandant pour donner la liberté de voyager, d'entrer et de sortir librement de ses terres, *Fides publica*.' *Sobrino, Nouv. Dict. Espagnol, Francais, et Latin.*

[2] *Vattel, Droit des Gens, l. 3. c. 17. s. 265. et seq.*

[3] *4 Bl. Comm.* 68.

[4] *Wheat. Capt.* 59.

[5] 'PASSEPORT. C'est *une permission de l'Amiral* pour voyager en sureté et être reconnue par tout. C'est sur ce passeport que les bâtimens de commerce naviguent.' *Encyclop. Meth. art. Marine.*

[6] *2 Azuni, Appx. No. 9. p. 401. Johnson's Transl.*

a pass under the royal seal of the regency of Pomerania at Stettin was used.[1] In our treaty with Holland, the form of a sea letter is given, which is in the name of the burgomasters and regents of the city, acting under an ordinance of the States General. In England, such documents are issued by the Lords Commissioners of the Admiralty, as is shown by the papers in the case of the *Nereide* in this Court : [2] and on foreign stations, they may be issued by the Admirals commanding those stations. In the famous *Black Book of the Admiralty*, we find it laid down, that all intercourse with the enemy is prohibited, unless under a special license from the King or his Admiral.[3] In the case of the *ships taken at Genoa*,[4] Sir W. Scott declares, that Lord Keith, as Admiral commanding the expedition, had a right to grant passports to protect the ships sailing under them. And in this Court, the licenses issued by Admiral Sawyer, and
p. 19 countersigned by a | British Consul, were determined to be passports which would protect against British capture.[5] At Gibraltar, these documents are issued in the name of, and signed by, the Commissioners of the Admiralty at that place.[6] As to the usage of Spain, it appears, by a royal passport, found on board the Isabella, and issued for another ship called the Clara, to be usually issued at home by the Secretary of the Marine in the King's name ; but it also appears by an indorsement on this very paper, that the Spanish commandants of foreign stations, or *Apostaderos*, may alter such passports, and grant liberty to change the course of the voyage. And they may also issue original passports, in their own name, where there is a deficiency of royal passports, and the vessel has not been previously documented. Such is the passport which was issued to the Isabella in the present case. The power to issue such documents of protection, is necessarily incident to the vast authorities conferred on the Spanish colonial governors ; and the case of the British ship of war Eliza, which was compelled to enter the port of Havana in distress, in time of war, and to which the Captain General, after relieving her wants, gave a passport to protect her from capture, is an example of the exercise of the power in question highly honourable to the generosity of the Spanish
p. 20 character.[7] The treaty under which | protection is now claimed, was conceived in the spirit of that benevolent policy so long cherished by the United States, and which Spain has reciprocated. It has for its object to limit the range of warfare on the high seas, and to extend the immunities of the neutral flag. In this spirit it ought to be construed. A comparison of its provisions with those of other conventions for the same object, will show the correctness of the interpretation for which we contend.

[1] *Wheat. Capt. Appx. No. I. p.* 334. *Report of Sir George Lee, &c. Vide* 6 *Wheaton*, APPENDIX, Note No. II.
[2] 9 *Cranch*, 388. [3] *Wheat. Capt.* 159. [4] 4 *Rob.* 317.
[5] The Julia, 8 *Cranch*, 181. The Aurora, 8 *Cranch*, 203. The Hiram, 8 *Cranch*, 444. The Ariadne, 2 *Wheat. Rep.* 143.
[6] *Reeves' Law of Ship. Appx, No.* 9, *in fin.* [7] *Raynal Hist. tom. 7. p.* 455.

In the French treaty of 1778,[1] which was the forerunner of the armed neutrality of 1780, a passport or sea letter in a certain form is provided to protect the ship. But there is nothing from which it can be inferred that this document is to issue from the supreme executive of the respective nations. To show how subordinate a consideration was that of form, it is deserving of remark, that the form actually annexed to the treaty, omits a circumstance which the text of the treaty expressly requires—'the place of residence of the master.' So that a passport precisely corresponding with the form annexed, was adjudged by the Court of K. B. in England, who had not seen the annexed form, to be substantially defective in this respect, and thus to falsify the warranty of neutrality in a policy of insurance.[2] So the treaty with Holland of 1782,[3] contains analogous stipulations with those of the Spanish treaty. It gives the form | of a passport, *and* of a sea letter, which are afterwards p. 21
spoken of as the same, or at least, as equipollent documents. The passport does not show by whom it is to be signed; but it shows, that it may be issued by individuals signing their own names, and affixing their own private seals, and that it was not thought necessary, that it should issue in the name of the chief magistrate; and the sea letter is unequivocally to be issued by an authority less than the supreme power of the State. The treaty of 1783, with Sweden,[4] repeats the same stipulations of the unlimited liberty of commerce, and that free ships should make free goods; and to prevent disputes, a passport or sea letter is to be furnished, showing that the vessel belongs to a subject, which is to protect from all further inquiry, and is to be made out in 'good form.' Here the form is avowedly left to the exercise of an honest discretion on each side. In the treaty with Prussia, of 1785,[5] the same conclusive effect is attributed to the sea letter or passport, the form of which was to be subsequently concerted by the contracting parties. From these the treaty with Spain was copied, whose Government gloried in being the first among the southern powers of Europe that acceded to the principles of the armed neutrality.[6] One of the leading principles asserted by that confederacy, went to exclude | from the jurisdiction of the belligerent Prize Courts whatever was done p. 22
under the neutral flag, and to render it matter of negociation between State and State. A national contract made to carry into effect this principle, is to be construed according to its intention and spirit, which meant to rely upon the justice and honour of both nations, that neither would impart to enemy vessels the immunities which were intended to be confined to neutral property. Enlightened views of interest would

[1] For the provisions of this treaty, *vide* 6 *Wheaton*, APPENDIX, Note No. III.
[2] Baring v. Christie, 5 *East's Rep.* 398.
[3] For the provisions of this treaty, see 6 *Wheaton*, APPENDIX, Note No. III.
[4] For the provisions of this treaty, see 6 *Wheaton*, APPENDIX, Note No. III.
[5] For its provisions, see 6 *Wheaton*, APPENDIX, *ib.* [6] 2 *Azuni, Appendix, No.* 31.

induce the neutral State not to permit any but its own subjects to avail themselves of the concession; and though every possible abuse might not be prevented, yet cases of fraud would rarely occur, and the evils produced would be far outweighed by the immense importance of the general security of commerce, and the consequent mitigation of the evils of war. The authority of the Spanish Government, to issue a passport certifying the proprietary interest in the vessels of its own subjects is unquestionable, and the local law and usage must determine its form, and the authority by which it is to be issued.

3. But supposing the passport produced not to be precisely such as the treaty intended, yet it is insisted, that, with the other documents, it furnishes testimony 'entirely equivalent,' according to the expression used in the 17th article. It is important to fix the precise meaning of the last clause of that article. The preceding clauses stipulated, that the ship shall have a passport to show that she belongs to the neutral State,
p. 23 and a certificate to show that her cargo | (to whomsoever belonging) is not contraband. By the 18th article, if she is furnished with these documents, she is to be exempt from all detention or molestation. If not furnished with them, she may be carried in for adjudication, and then must account for the omission, and furnish other testimony, which, considering all the circumstances, shall be of equal value with that omitted. Suppose the omission satisfactorily accounted for: what is the equivalent testimony required by the treaty? Most certainly it is, that which completely proves the same facts which the omitted documents would have proved. Even a passport, in due form, does not prove that the ship is, in fact, neutral. With whatever formal solemnities it may be cloathed, it must issue from the custom house of the power by whom it is granted. It may be issued improperly. The officers authorized to issue it, may be deceived by fraud and perjury. The possession of the document only proves the fact that the property of the ship has been decided to be neutral by the competent authorities, by those to whom the sovereign power of the State has entrusted the examination of the question. Their determinations are made conclusive by the treaty, and import absolute verity, in the same manner as the solemn judgments of the Courts of justice. If, then, this document cannot be had, but its absence is accounted for, and other papers are produced, which however inferior in formal solemnity, unequivocally prove such a decision by the competent authority of the neutral State, then this secondary evidence is completely equivalent to
p. 24 the passport and certificate | provided for in the treaty. This exposition is the only one consistent with the spirit of the treaty, and is in furtherance of its avowed object, which was that the flag should protect the property sailing under it, if used by authority of the neutral nation. This exposition is conformable to the English version of the treaty, but is

absolutely required by the Spanish ; and even if there were any difference of meaning, we are bound in honour and good faith to adopt the latter, since Spain has always acted upon it, and has seldom or never thought it necessary to document her ships according to the literal requisitions of the treaty. Unless this exposition is admitted, the whole of the clause in question is nugatory. By the universal law and usage of nations, every captured vessel is at liberty to account for the want of formal documents.[1] It would, therefore, have been superfluous to insert a provision in the treaty to this effect. Something more must have been intended by the use of terms, which are to be found in no other treaty. In the case now before the Court, the omission of the required document is fully accounted for by the actual state of the mother country at the time, and by the declaration of the colonial Governor when he granted the substituted document. This ought to be considered as equivalent proof, because it is next in dignity, and approaches very nearly to a level with the royal passport itself. It is issued by an officer who is only not King ; who would have been charged with the delivery and control of royal passports ; who expressly declares, that it was issued in | lieu of p. 25
such ; and certifies every fact which would have been stated in a royal passport. The other documents are superadded to that which would alone have been required, had the formal requisitions of the treaty been complied with, and are abundantly sufficient to establish the proprietary interest in the ship. They are supported by the depositions of the captured crew, who are required by the navigation laws of Spain to be Spanish subjects, and whose national character conforms to this requisition.

4. Again. If there be no passport such as is required by the treaty, and no such equivalent testimony as the treaty provides, still the claim to the ship is established by evidence such as the law of nations requires to establish it ; and if the property of the *ship* is shown to be Spanish, that is sufficient to protect the *cargo* to whomsoever belonging.[2] She is furnished with all the usual documents, and none are of a suspicious or irregular character. They are supported by the testimony of all the witnesses, except one ; and he was improperly examined, not being produced in his regular order, but kept back until other witnesses had been examined, contrary to the well-known rule of the Prize Court, which requires the captors to introduce all the witnesses in succession.[3] Even if the proprietary interest in the *cargo* should be thought doubtful, that being included in the same claim with the *ship*, will not necessarily involve both in condemnation ; for, an attempt | to conceal enemy's p. 26

[1] The Pizarro, 2 *Wheat. Rep.* 244.
[2] The Pizarro, 2 *Wheat. Rep.* 227.
[3] The Speculation, 2 *Rob.* 242. The William & Mary, 4 *Rob.* 312.

property only affects the right to farther proof.[1] But we insist that farther proof is not required in this case; and if the national character of the ship be established by the original evidence, the conventional law entitles us to restitution of the cargo, as a matter of course.[2]

5. Lastly. Supposing the original evidence in the cause insufficient to entitle the claimant to restitution, either according to the provisions of the treaty, or by the general law of nations, it is insisted that all the difficulties of the case are removed by the farther proof produced, which establishes the proprietary interest of both ship and cargo as claimed.

Mr. *Wheaton*, for the captors and respondents, 1. answered the objection taken by the claimant's counsel to the validity of the commission under which the capture was made. This is exclusively a question between the captors and the United States. The claimant has no *persona standi in judicio* to assert the rights of the United States, and it is not until after the determination of the principal question of prize or no prize, that the claim of the government can be interposed.[3] This is not only our own practice, but is the prize law of France, and England, and of the whole
p. 27 maritime world.[4] Even | if the present capture be a droit of admiralty, as taken by non-commissioned captors, that will not invalidate the capture, if it be of enemy's property. This is to be determined after a general decree of condemnation is entered, and before a final distribution of the prize proceeds. If the Government shall interpose a claim at that stage of the proceedings, it will then be time enough to consider a question in which the foreign claimant has no interest or right to interfere.

2. The vessel and cargo in this case are liable to condemnation as prize of war, having left the Havana with a false destination. The claim sets up an alternative destination, to an enemy's or a neutral port; but it is contradicted by the documentary evidence and the depositions of the captured persons. This false destination is not excusable on the ground of the necessity of deceiving an enemy by clearing out for a neutral port. Spain was at that time at peace with all the world, except her revolted colonies; and both London and Hamburg were equally neutral ports in respect to the South-American cruizers. A false destination under such circumstances is damnatory, if the case be so infirm as to require farther proof; because it could only be intended to conceal enemy interests, and if alternative, it ought to appear to be such on the face of the papers, in order that captors may not be misled.[5] |

[1] The Madonna del Burso, 4 *Rob.*

[2] The Pizarro, 2 *Wheat. Rep.* 227.

[3] The Dos Hermanos, 2 *Wheat. Rep.* 94.

[4] 2 *Bro. Civ. & Adm. Law*, 524. 2 *Woodes. Lect.* 432. 3 *Bulstr. Rep.* 27. 4 *Inst.* 152. 154. *Zouch. Adm. Jurisd. c.* 4. *p.* 101. *Comyn's Dig. tit. Admiralty E.* 3. The Georgiana, 1 *Dodson's Rep.* 397. The Diligentia, 1 *Dodson's Rep.* 403. *Valin. Comm. l.* 3. *tit.* 9. *des Prises, art.* 1. *Pothier, de Propriété, No.* 93. *Casaregis. Disc.* 24. *Consolato del Mare, c.* 287.

[5] The Juffrouw Anna, 1 *Rob.* 125. The Welvaart, 1 *Rob.* 122. The Nancy, 3 *Rob.* 125. The Mars, 6 *Rob.* 79. 86. The Vrouw Hermina, 1 *Rob.* 164.

3. The proofs of proprietary interest, upon the original evidence, are p. 28
not such as to entitle the claimant to restitution, without farther proof. As to the *ship*, there is no doubt that if *bona fide* Spanish property, and documented according to the treaty, she must not only be restored, but the *cargo* also must be included in the restitution, even if proved to be enemy's property. But it is insisted that the treaty does not extend to a fraudulent use of the Spanish flag to cover enemy's property in the ship as well as the cargo.[1] The passport, even supposing it to be such as the treaty requires, is falsified by the muster-roll and other documents; and it was not produced, as the treaty requires, to the captors, but found on board after the capture. Fraud will vitiate even a judgment, and the most solemn instruments and assurances. This is a principle of universal law, and it would be indecent to suppose that Spain countenances such an improper use of her flag and pass. Is there, then, that *equivalent* testimony which the treaty substitutes for the formal passports? The law very properly requires the bill of sale to be on board where the vessel is transferred from the original proprietor.[2] Even *Hubner*, the great champion of neutral rights, admits this to be the rule.[3] But here the vessel is not Spanish built; yet no bill of sale is found on | board, and the circumstances p. 29
strongly point to the previous existence of enemy interests in the vessel, which it appears came from New-Providence. The purchase of enemy's vessels by neutrals is entirely prohibited by the ordinances of some countries; and our law regards it as suspicious.[4] If still continued to be employed in the enemy's trade, or under the control of an enemy, this is deemed a badge of fraud, and conclusive evidence that there has been no *bona fide* transfer.[5] The ship then is not documented *bona fide*, as the treaty requires, nor is the substituted proof equivalent to that for which it is substituted. The *ship*, therefore, will not protect the *cargo*, nor is the latter so documented as to protect itself, or avoid being involved in the same fate with the vessel. To be sure, there are the usual formal documents, and so there are in every case. But they contradict each other; and being fraudulently blended in the same false claim with the ship, they must be included in the same condemnation. Both being alleged to belong to the same claimant, and he having attempted to assert a false claim to the ship, the entire claim must be rejected as a penalty for his fraudulent conduct.[6]

4. But the passport in this case, even supposing it not to have been

[1] The Minerva, 1 *Marriott's Adm. Dec.* 235. The Cittade de Lisboa, 6 *Rob.* 358. The Eendraught, *Ib.* Note (a.) The Estern, 2 *Dall.* 36.
[2] The Welvaart, 1 *Rob.* 122.
[3] *De la Sais. des Batim. Neutr. Part.* 1, *c.* 3. *s.* 10.
[4] The Bernon, 1 *Rob.* 102. The Sechs Gedchwistern, 1 *Rob.* 100. The Argo, 1 *Rob.* 153.
[5] The Jemmy, 4 *Rob.* 31. The Omnibus, 6 *Rob.* 71.
[6] The St. Nicholas, 1 *Wheat. Rep.* 417. The Fortuna, 3 *Wheat. Rep.* 236.

fraudulently obtained and used, is not such as the treaty requires, being
p. 30 issued by an authority incompetent to grant such a document of | protection. It is insisted that nothing less than the solemnly pledged faith of the supreme power of the neutral state to the verity of the facts stated in the passport can possibly satisfy the belligerent. The terms used in the treaty are 'sea letters *or* passports.' One of the contracting parties might understand it as intending a document in the nature of a permanent muniment of the title to the ship. Our laws recognize no other such document, than one signed by the President. The presumption, therefore, is, that our vessels were to be furnished with a sea letter thus signed, and the Spanish vessels with a royal passport signed by the king. The cases cited on the other side, to show that such a document of protection may be granted by an authority inferior to the supreme power of the state, are not in point. In the British license cases, although this Court condemned our vessels sailing under them, yet the British prize Courts denied the authority of their admirals and consuls to issue them, and condemned the vessels taken by British cruizers although sailing under these licenses.[1] All the other cases cited are of passports issued by the Lord High Admirals of England or France, acting as the immediate delegates of the royal prerogative, and as the ministers of the crown. There is no doubt, that Admirals and Generals, commanding fleets or armies, have the power of issuing passports for the temporary protection of persons or property, within the limits of their command. But this arises from the necessity
p. 31 of the case, and is incidental to the performance of | their official duties. But it is not incidental to any official duty of the Governor and Captain General of the Island of Cuba, that he should have the power of naturalizing foreign ships, giving them all the privileges of Spanish built vessels, and grant passports to protect them against belligerent scrutiny: *Non ei rei præponitur.* It is highly improbable that the Government of this country would have agreed to a stipulation so improvident, under which the whole navigation of our enemy might be screened from capture by a mere fictitious adoption, fraudulently or corruptly obtained for this purpose. The *form* of this important document being omitted, either from accident or design, there is the more necessity of looking to the *substance* of the contract; since, if the form had been annexed, there is no doubt that it would have required the highest authority of the State to grant a document so conclusive. The passport or sea letter provided by this treaty, is not a mere ordinary license or safe conduct given by a General or Admiral, for a temporary purpose, and within the limits of his command. It is the supreme power of the neutral State solemnly pledging itself to the belligerent, that the property of the ship is truly and *bona fide* neutral. The doctrine contended for on the part of

[1] The Hope, 1 *Dodson's Rep.* 226. *Id. Appendix,* (D.)

the claimant, would go the length of entirely abolishing maritime captures; since the passport may be issued by any authority, however inferior and however remote his functions may be from such a duty. The treaty provides, that the *certificates* which are required relative to the cargo, shall be issued by the officer of the place | whence the vessel sails, and the p. 32
same proviso would have been made as to the *passport*, had it been intended to entrust the local magistrates with the power of granting it. Neither does an examination of the forms of similar documents annexed to other treaties, containing the same stipulation, that free ships shall make free goods, justify the inference, that they may be issued by any authority less than the highest. So, also, the celebrated convention of 1801, between Great Britain and Russia, though it does not contain such a stipulation, but, on the contrary, subjects enemy's property in neutral vessels to capture, yet it provides for similar documents of protection, and in the formula annexed, it is stated, that they are 'to be delivered in *the respective Admiralties of the two high contracting parties.*'[1] But the question has already been determined in this Court, in the case of the *Pizarro*.[2] In that case, the Court say, 'It is certainly true, that the vessel was not furnished with such a sea letter, &c., as are described in the 17th article.' But she had on board the proceedings under which she was naturalized in East Florida, and a certificate from the Spanish Consul at Liverpool, certifying, that 'Captain Don Antonio Martinez, commanding the Spanish ship called the Pizarro, of the burthen of 273 tons, registered at the port of St. Augustine de la Florida, which came to this port from the Island of Amelia, with a cargo, now sails for the port of Corunna, in | Spain.' Here, then, was a certificate, stating the p. 33
name, burthen, and property of the ship, and the name of the master, and issued by an authority as competent as the Governor of Cuba. Yet the Court held it not to be a compliance with the terms of the treaty, and required farther proof of the proprietary interest.

5. Supposing, however, this vessel and cargo to be documented as the treaty requires, it is insisted that they are liable to condemnation for sailing under the protection of enemy's convoy. It is true, that the Isabella parted company with the convoying ship before the capture; but it was a mere temporary separation, the latter having gone in pursuit of one of our privateers. Although the Court has determined, in the cases of the *Nereide*[3] and the *Atalanta*,[4] that a neutral may lawfully put his goods on board an armed enemy's vessel, yet it has not determined that he may put his vessel *and* goods under convoy of the enemy's fleet. The distinction between the two classes of cases is stated by one of the learned Judges of this Court, in delivering his opinion in the *Atalanta*:[5]

[1] For the provisions of this treaty, *vide* 6 *Wheaton*, APPENDIX, Note No. IV.
[2] 2 *Wheat. Rep.* 244. [3] 9 *Cranch*, 388. [4] 3 *Wheat. Rep.* 409.
[5] Per Mr. Justice JOHNSON, 3 *Wheat. Rep.* 423.

and the Lords of Appeal in England have held the offence of sailing under the protection of enemy's convoy to be a conclusive cause of condemnation.[1] So, also, where certain merchant ships belonging to the *Hanse*
p. 34 *towns* had put themselves under | the protection of *Swedish* convoy, the latter having assumed a hostile character for the purpose of resisting the right of search, they were equally held liable to confiscation.[2] Such also, is the law of Denmark, a state that has always professed to maintain the mildest principles of prize law.[3] In his correspondence with the Danish government, Mr. Erving, our minister, admits the extreme difficulty of upholding the contrary doctrine; and only seeks to escape from it by contending that the rule could not extend to vessels *forced* into the convoy, or *accidentally* involved in the enemy's fleet: and this may readily be admitted without at all weakening the force of the general rule.

6. This is an aggravated case of spoliation and concealment of papers. Were this Spaniard to be tried by his own law, he would be instantly condemned. By the law of the whole world, except that of the United States and Great-Britain, spoliation of papers is *per se* a cause of confiscation: and by our law it is all but damnatory. If the spoliation is unexplained, or the explanation is unsatisfactory; if the cause labours under heavy suspicions or gross prevarications, farther proof is denied, and condemnation inevitably follows.[4] And it is a relaxation of the rules of the Prize Court to allow farther proof even where there has been
p. 35 a mere concealment of | papers.[5] But here are both suppression and spoliation; and a case which escapes from this imputation, (to use the emphatic language of Sir W. Scott) 'is saved as by fire.'[6] In the present case, the spoliation and concealment are not only unexplained, but inflame the other circumstances of suspicion. The acts of the supercargo, in this respect, bind the owners, because he is their confidential agent; and the ship-owner is always bound by the misconduct of the master in all respects.[7] So, also, the act of the master binds the owner of the *cargo*, if he is also the owner of the *ship*;[8] and according to a decision of the Lords of Appeal, whether he is owner of the ship or not.[9] The act of the agent or consignee of the cargo is conclusive upon the owner of the cargo.[10]

[1] The Sampson, Barney, cited by Mr. Justice STORY, in a note to the Nereide, 9 *Cranch*, 442.

[2] The Elsebe, 5 *Rob.* 173. [3] 4 *Hall's Law Journ.* 467. *Ordonn. of* 1810.

[4] The Pizarro, 2 *Wheat. Rep.* 241. The Rising Sun, 2 *Rob.* 106. The Hunter, 1 *Dodson's Rep.* 486.

[5] The Fortuna, 3 *Wheat. Rep.* 245.

[6] The Hunter, 1 *Dodson's Rep.* 4.

[7] The Rising Sun, 2 *Rob.* 108. The Vrow Judith, 1 *Rob.* 150. The Adonis, 5 *Rob.* 256. The Imina, 3 *Rob.* 167. The Mars, 6 *Rob.* 79. 2 *Valin Comm.* 253. 1 *Emerigon des Assur.* 449.

[8] The Rosalie & Betty, 2 *Rob.* 343. The Alexander, 4 *Rob.* 93. The Elsebe, 5 *Rob.* 173. [9] The Franklin, 2 *Acton*, 106.

[10] The St. Nicholas, 1 *Wheat. Rep.* 417. The Vrow Judith, 1 *Rob.* 150. The Baltic, 1 *Acton*, 14. 2 *Binney*, 308. 15 *East's Rep.* 78.

And if the case be such as to require farther proof, it is to be granted or denied under the Spanish treaty, precisely in the same circumstances in which it would be granted or denied by the pre-existing law of nations.[1] But by the general law, this is a case in | which it would be refused, and p. 36 therefore it is an exception to the immunity secured by the treaty.

7. Finally. Even if farther proof were admissible, the farther proof produced does not establish the proprietary interest in a satisfactory manner. It is not incumbent on the captors to show to whom the property really belongs. It is sufficient that it does not belong as claimed.[2]

The *Attorney-General*, on the same side, insisted that the case was not within the protection of the treaty, because the vessel was not documented according to its provisions, and the only paper which could possibly answer to the description of the sea-letter or passport, required by the 17th article, was concealed, and not shown by the master to the captors, as provided by the 18th ; so that they had a right to detain and send in the vessel for adjudication. Being thus subjected to the ordinary jurisdiction of the Prize Court, she is to be tried by the ordinary rules of the prize law, independent of the treaty. This Court has already determined in another case, that the equivalent testimony, required by the 17th article, is to be such as the Prize Court would require, independent of the stipulations of the treaty.[3] No other testimony could give the '*legal satisfaction*' which the treaty demands. In a case requiring farther proof, the equivalent testimony is that farther proof : and the grant or denial of this | must rest upon the ordinary rules of the Court.[4] But here the p. 37 claimant has forfeited his right to farther proof, by his own aggravated misconduct in concealing the destination, and spoliating and suppressing the ship's papers, which it was his duty, both by the treaty and the general law of nations, to exhibit to the captors voluntarily and fairly. But supposing the passport to have been delivered to the captors at the time of the seizure, as it ought to have been, and suppose the usage of Spain to supply the omission of the form being annexed to the treaty, still the document produced is not such a passport as that usage requires. This is shown by the very terms of the document produced, which state it to have been issued 'for want of royal passports.' It is said that this is justified by the local usages of the colony ; but we are not bound to know those usages, or to admit that this Governor had the authority to substitute his passport for one signed by the King. The document required by the treaty, then, not being found on board, the parties are to give 'legal satisfaction of their property by testimony entirely equivalent.' This testimony is to be, according to the course of the Prize Court, the

[1] The Pizarro, 2 *Wheat. Rep.* 242.
[2] The Odin, 1 *Rob.* 227. The Neptunus, 4 *Rob.* 68.
[3] The Pizarro, 2 *Wheat. Rep.* 242.
[4] The Pizarro, 2 *Wheat. Rep.* 242.

papers found on board, and the examination *in preparatorio*. But these papers and depositions, so far from satisfying the conscience of the Court, increase the suspicions excited by the want of the documents required by the treaty; documents so easily procured where the property is really
p. 38 Spanish, and the vessel | fairly entitled to the privileges of a Spanish ship, that it is incredible any such vessel should want them. The *onus probandi* is on the claimant in such a case under the treaty, precisely as it would be by the general law of nations, independent of the special provisions of the treaty; and the question of proprietary interest is to be determined just as that question would be in any other case of prize. The investigation in the Prize Court is substituted in lieu of the investigation by the captors at sea, which last was to be entirely concluded by the treaty documents, if the ship was furnished with them; if not, she was liable to be brought in to ascertain the character of the *ship*, which, if adjudged to be Spanish, the same consequence of protection to the *cargo* will follow, as if the ship had been regularly documented according to the treaty. It is not the possession of papers equivalent, in formal effect, to those required by the treaty which will protect her from farther inquiry, but she must have papers which will produce the effect of giving satisfactory evidence of the proprietary interest according to the ordinary rules of the Prize Court. If the substituted documents were fraudulently obtained and used, would that be satisfactory evidence? The spirit and intention of a treaty is always to be regarded in its interpretation.[1] Every object of such a treaty would be entirely defeated by permitting an enemy to avail himself of provisions contained in it, and intended for the exclusive
p. 39 benefit of a friend; and even if a | Spanish subject, by perpetrating a fraud upon his own government, lends the protection of its flag to a foreigner, that Spaniard becomes himself an enemy, and cannot justly complain if he suffers the fate of an enemy. It is no disrespect to Spain, or disregard of her national rights, to refuse the benefit of her flag and pass, where they have been obtained by practising an imposition upon her officers. She can claim no greater respect for their acts than is conceded to the judgments of the highest Courts of justice. But even these are vitiated by fraud, according to the law of every country. Great Britain so understands the effect of a similar treaty stipulation. In the case of the *Cittade de Lisboa*,[2] which was determined under the British treaty with Portugal, containing the principle of *free ships, free goods*, though the vessel had the Portuguese flag and pass, she was condemned because a box of papers was found on board falsifying the claim, and showing the property to be enemy's; and to give more solemnity to the judgment of the Court, the Portuguese Consul was called in to witness it, and admonished to advise his government to be more vigilant over the conduct of its officers

[1] *Vattel. Droit des Gens, l. 2. c. 17. s. 268–270. 274–282.* [2] *6 Rob. 358.*

in this respect. So, also, our own Court of Appeals in prize causes, during the war of the revolution, held the general maxim of *free ships, free goods*, which had been temporarily recognized in an ordinance of Congress, not to extend to a case of fraudulent combination between the enemy and neutrals to defeat the belligerent rights of the United States and her ally.[1] In that case, the Court observed, | that Congress had not said that a p. 40
violated neutrality should protect; and the mention of some exceptions to the general immunity, (such as contraband, &c.) does not exclude others, equally flagrant, though not mentioned. So in this case, the exceptions of blockade and contraband, do not exclude other cases of unneutral conduct; and some implied exceptions there must be, or how could the Court engraft the exceptions of the property, of citizens of the United States trading with the enemy, or of Spanish subjects not actually domiciled within the dominions of Spain, both of which cases are excluded from the general operation of the treaty, according to the opinion of this Court in the *Pizarro*.[2] If, then, the case is not within the protection of the treaty, does either the original evidence, or the farther proof, satisfy the Court of the property of the ship and cargo being as claimed? This inquiry cannot be limited to the *ship*, because if that was really Spanish, it would be sufficient to protect the *cargo* also: but both are included in the same claim, which is given for the same person; and if the claim for the cargo be false, that will also affect the claim to the ship. If the ship was Spanish property, why seek to show that the cargo was Spanish also? The proprietary interest in the ship is supposed to have been acquired under a judicial sale upon a bottomry bond. But the previous history of the ship is not satisfactorily explained, and so far as it is given, points to an enemy origin: and the proceedings under which the | sale was had, p. 41
are manifestly collusive and fraudulent. The claim to the cargo is also supported by mere formal documents, unsupported by the oaths of witnesses, and contradicted by the *evidentia rei*. The spoliation and concealment of the papers are not satisfactorily explained. Such explanation could only proceed upon the ground of the papers being innocent in themselves, and that they were destroyed from a necessity unconnected with an attempt to evade the right of search. But as to the papers thrown overboard, all that we know of their character is, that they came from the compting house of the claimant, who ordered them to be thrown overboard, in case of capture; and as to the supposed necessity of destroying them, the only reason alleged is the fear of South American cruizers. This could not be the true reason, since the papers retained on board would equally show the Spanish ownership of the ship and cargo, which it is now insisted they are sufficient to establish. And as to the papers mutilated and concealed, a careful inspection of them will satisfy

[1] Darby v. The Estern, 2 *Dall.* 35. [2] 2 *Wheat. Rep.* 245. 246.

the Court, that they point to the English origin of the adventure, and to English interests in its results. The learned counsel concluded by a very minute and able analysis of the proofs of proprietary interest.

Mr. *Harper*, for the claimant and appellant, in reply, (1.) insisted that the destination of the vessel, in this case, was not a false destination; and that even a false destination is not a substantive cause of condemnation. | A false destination, is an unlawful destination concealed: but here p. 42 the alternative destination did, in fact, appear on the face of the papers, and both London and Hamburg were equally lawful ports for Spanish vessels to trade with. In the cases of the *Juffrouw Anna*[1] and the *Welvaart*,[2] the false destination was combined with other circumstances of illegal conduct or suspicion, and the condemnation did not proceed upon that ground alone. In the case of the *Nancy*,[3] it was also connected with the offence of carrying contraband goods on the outward voyage. So the case of the *Mars*,[4] was that of engaging in the colonial trade of the enemy, attempted to be concealed by a false destination; and farther proof being necessary, it was refused on account of those circumstances of fraud and illegality.

2. Nor ought the present case to be affected by the fact of the vessel having set sail from the Havana under convoy of a British frigate. This protection was necessary against South American cruizers, to whom Spanish property would have been good prize. But the Isabella intended to leave her convoy off the coast of Florida, and such an intention admits of a *locus penitentiæ* which was availed of: for she had in fact left the fleet, before the capture. The case of the *Hanse* vessels taken under p. 43 *Swedish* convoy was very different from this.[5] The Swedish | armed vessels prepared to resist, and only yielded to the terror of a superior force; and the *Hanse* vessels were affected by what was considered as an actual resistance of the convoy, having associated themselves under its protection.

3. As to the spoliation and concealment of papers, the facts do not warrant the inference of its having been done for unlawful purposes. There is no evidence whatever that the papers thrown overboard were connected with this transaction. The concealed papers were innocent; and were even essential to show the Spanish interest in the cargo: and as to the mutilation, if practised at all, it must have been by the captors themselves, as they alone had an interest in defacing papers which were material to the claimant's proofs of property. The fact as to the papers thrown overboard was frankly and freely disclosed by the parties who alone had any knowledge of it, and a satisfactory reason for their conduct assigned by them on their first examination. Even supposing, however,

[1] 1 *Rob.* 125. [2] 1 *Rob.* 122. [3] 3 *Rob.* 125. [4] 6 *Rob.* 79.
[5] The Elsebe, 5 *Rob.* 173.

that the fact of the spoliation and suppression of papers would, under other circumstances, exclude the claimant from the benefit of farther proof, it is now too late for the captors to object, an order for farther proof having been granted in the Court below, without any objection on their part.[1]

4. The passport in this case is sufficient to establish the national character of the ship, so as to protect both her and the cargo under the treaty with | Spain. It is one of a series of passports issued by the Governor p. 44
of the island of Cuba; is numbered 94, showing that many more of the same kind had been issued; and the words '*For want of royal passports*' are *printed*, which circumstance shows that it was an established formula. The circumstances of the Spanish nation at that period, when Ferdinand had been just restored to the throne, sufficiently explain the cause of the defect of passports, with the king's sign-manual. The very act of exercising such an authority on the part of the colonial Governor, is strong *prima facie* evidence of his possessing the power; and until rebutted by some contrary proof, must be considered as conclusive that such is the usage of Spain. There is no substantial difference between such a document and royal passports; since the latter must be issued in blank, and sent to the different ports throughout the extent of the Spanish dominions, and the distribution of them entrusted to subordinate officers, so that the same frauds may be perpetrated as are imagined in the present instance. What better security have we that the royal passport itself will not be employed to protect the trade of our enemy? It may be safely admitted, that you may inquire so far as to ascertain that the passport is not forged, or obtained by criminal means, or fraudulently applied to a vessel, for which it was not issued: But if none of these circumstances occur, and the passport regularly issues, from an authority which is competent to grant it according to the local usages of the neutral country, the treaty makes it conclusive, on the question of | property. p. 45
In this case, the passport was granted, under a judicial decree of the *Consulado*, at the Havana, proceeding according to the course of the Court of Admiralty, to enforce a bottomry bond, given for repairs to the ship. The sentences of foreign tribunals, having jurisdiction of the subject matter, and proceeding *in rem*, are considered as conclusive, by the law of this, and every other country, wherever the title to the thing comes incidentally, or directly, in controversy. Here it is the very question in issue before the Court; and the decision of the Spanish tribunal not only warranted the Governor of Cuba in granting the passport, but even if he had not issued it, would bind this Court to consider the property as Spanish. Therefore, admitting that the captors had a right to bring in this vessel for adjudication, because she had not the passport required by the treaty, or because it was not exhibited to them at the time of the

[1] The Pizarro, 2 *Wheat. Rep.* 227. 240.

capture, still the equivalent proof is more than sufficient to supply the want of a passport in any form that can be conceived ; because, it shows, that the ship was entitled to every document which could prove her to be a Spanish ship, the tribunal of the Consulado having adjudged her to be Spanish property. The captors may possibly be exempt from costs and damages ; but it does not, therefore, follow, that the case is taken entirely out of the special provisions of the treaty, and left at large to be determined under the law of nations. The object of the treaty was to provide, that neutral vessels should protect goods to whomsoever belonging, with the
p. 46 exception of contraband only. The | passport was to be conclusive of the neutrality of the ship, and the certificate was to show, that the cargo was not contraband. If these documents are wanting, then the property of the ship is to be established by equivalent testimony ; and that being shown to be neutral, will protect the cargo, even if enemy's property, unless, indeed, it consist of contraband articles. The ' equivalent testimony ' required, must mean, that other documents shall be produced which will prove precisely the same facts that were intended to be proved by the passport and certificate ; and not that sort of evidence which the technical rules of the Prize Court demand in a case requiring farther proof. Doubtless the intention of the contracting parties is to be regarded in construing treaties, as it is in the interpretation of all other instruments ; but that intention is to be gathered from the words they use. Although there are many treaties consecrating the maxim, that free ships shall make free goods, there is no other example of a treaty stipulating what should be conclusive evidence of the freedom of the ship. The parties to this treaty intended to exclude the jurisdiction of the Prize Courts of the belligerent as far as possible, by forbidding the detention of vessels having the required documents, and where they were carried in for adjudication for want of these documents, limiting the inquiry of the Prize Courts to such testimony as should be equivalent. All the cases cited on the other side, of the supposed exception to the general immunity, are cases arising under
p. 47 treaties or ordinances, merely recognizing the principle, that free | ships should make free goods, without providing any rule of evidence to establish the national character of the ship, and leaving that question to be determined by the general law of nations. But here the conventional law adopts a new rule of evidence, from which the Court is not at liberty to depart.

The learned counsel also argued the question of proprietary interest with great minuteness and ability.

March 4th, 1820.

The *Court* directed the cause to be reargued, upon the point as to the form and effect of the passport.

The *Attorney-General*, for the captors and respondents, insisted, that the *form* of passport to which an effect so important was attributed, not having been annexed to the original treaty, by the contracting parties, could not now be supplied by the judicial tribunals of either. Such an attempt would be an encroachment on the treaty-making power, which, in our government, is exclusively confided to the President and Senate. The office of this Court is to construe, not to make or amend treaties. The treaty (art. 17.) provides, that 'the ships and vessels *belonging to the subjects or people of the other party*, must be furnished with sea letters or passports, expressing the *name, property, and bulk of the ship*, as also *the name and place of habitation of the master* of the said ship, that it may appear thereby that the ship *really and truly belongs to the subjects of one of the parties*, which passport shall be made out and granted according to the form annexed to this treaty.' These particulars were required to be inserted for | the purpose of identifying the vessel to which the passport p. 48
was intended to apply, and to satisfy the other contracting party that she is really entitled to the immunities stipulated in the treaty. The passport in the present case was either intended to certify that the ship was Captain Cacho's, or not. The words are, 'Captain *Cacho, with his Spanish ship* called,' &c. If Cacho was meant to be certified to be the owner, the claim does not conform to it. He expressly swears that it is not his, but that it belongs exclusively to Munos, who claims. Nobody else can have restitution but the actual claimant, and he is not certified in the passport to be the owner. But the term '*his Spanish ship*,' is evidently a mere figurative expression, and means nothing more than the ship of which he is master. What then is the import of the term '*Spanish* ship?' A certificate that a ship of a certain name, and bulk, and master, is a *Spanish ship*, is not a certificate that it is Spanish *property*, or in other words, the property of Spanish *subjects*, which is alone intended to be protected by the express terms of the article. A vessel may be a *Spanish ship* by adoption, by having a license to trade with the Indies, without ceasing to be the property of foreigners, or becoming the property of Spanish subjects. It is not sufficient to certify the national character of the ship merely. There must be a certificate that it is the individual property of particular subjects of Spain, for to such alone does the protection of the treaty extend. The treaty being left imperfect in omitting to annex the form of | passport, it is very questionable whether the stipu- p. 49
lation as to its effect as evidence, is not wholly void. But admitting that the Court can supply the form, how is it to be done? Two modes may be selected. First, to take the literal words of the treaty; and then the passport should have stated the ship to be the property of Munos, the claimant: or, secondly, the form may be supplied by referring to other treaties similar in their nature. In the form of passport annexed to the

French treaties of 1778 and 1801, the master is required to swear that 'the ship belongs to one or more of the subjects of ———. The act whereof shall be put at the end of these presents,' &c. No form of the oath which is to be thus appended is given: but the Dutch treaty of 1782, shows what the form of the oath would probably be: 'C. D. of ———, personally appeared before us, and declared by solemn oath, that the ship or vessel called, &c. does rightfully and properly belong to him or them only,' &c. The terms of these treaties are the same with the Spanish treaty, and require 'the name, the *property*, and the burthen of the vessel,' to be expressed. It is not property in the abstract, the national character merely, acquired by a fictitious adoption into the navigation of Spain; but the individual proprietary interest of some Spanish domiciled subject, that is to be protected.

Mr. *Harper*, contra, contended, that the treaty merely required the national character of the property, and not its individual ownership, to be expressed in the passport. There can be no doubt that this passport |
p. 50 must be according to the regular Spanish form, because both this and the royal passport for the Clara, which was also found on board, have the same expression, viz. 'his Spanish ship.' This is precisely equivalent to a certificate that the ship belongs to Spanish subjects. A warranty in a policy of insurance that a ship is an *American ship*, is a warranty that she is the property of citizens of the United States. The form of passport which was intended to have been annexed having been omitted, good faith requires that it should be supplied by construction, since it must be concluded that the parties intended to waive it. A construction has been given to the stipulation by the usage of the two countries, which is sufficient for all practical purposes. What good purpose would be answered by inserting the name of the owner? The Court could not inquire even whether such a person existed, much less as to his national character or domicil. The conclusive effect attributed to the passport, would prevent any such extrinsic investigation, and therefore a fictitious name might be inserted which would satisfy all the requisites of the treaty. So that a general certificate of the national character of the property is as efficacious as would be a certificate that it was the property of some particular person.

March 15th, 1820.

The cause was again argued, upon the application of the executive Government, to the Court, on the question of the construction of the Spanish treaty, and the form and effect of the passports. |
p. 51 Mr. *Pinkney*, for the captors and respondents, stated four points for the consideration of the Court.

1st. That the passport produced in this case, was not within the terms of the treaty, because it was obtained by fraud.

2dly. That it was not within the treaty, because not issued by the Spanish sovereign, or his known authorized substitute.

3d. That it was not within the same, because the only article which professes to provide for it, is incomplete and inofficious, the *form* never having been annexed, according to the terms of the article.

4th. Because the passport issued for this ship, is not conformable either with the terms or the substance of the article; since it does not state that the ship is the property of a *Spanish subject*, nor *name* any Spanish subject as the owner.

This treaty is, unquestionably, to be interpreted by a just regard to the public faith, but only so far as the public faith is actually pledged by it. The spirit which animated the parties to the armed neutrality is to be regarded; but it must be remembered, that the celebrated confederacy which has received that name, was intended to introduce new rules, to the disparagement and repeal of those which then existed, and in derogation of the ancient law of nations. The intention of the parties to the Spanish treaty, is also to be taken into view. But this intention is to be collected from the language they have used; if that be clear and plain, there is no room for interpretation; but, if ambiguous in itself, then the intention may be fairly collected from the | object and circum- p. 52
stances of the stipulation in question. In a word, the treaty is to be executed as it is, and no new treaty to be made by the labour of exposition.

1. The object of the stipulation is expressed in the article to be 'the ships and vessels *belonging* to the subjects or people of the other party,' &c. This, necessarily, excludes all other ships or vessels. Consequently, it cannot be applied to vessels which are not really those of Spanish subjects, but only fraudulently represented to be such. It is a principle, not only of the common law, but of universal jurisprudence, that fraud vitiates every act, whether public or private; contracts, deeds, and judgments, are all affected by it, even as to *bona fide* purchasers. No record, however solemn, estops an allegation of fraud. Judgments of Courts of competent jurisdiction import absolute verity, wherever they are brought in question; but if obtained by fraud, they are set aside, either in the same or any other tribunal; and a person affected by the fraud may show it and avoid the judgment, though not a party to the suit. Thus a stranger may avoid a recovery in a real action, if covenous or fraudulent, and he is prejudiced by it. These analogies of the municipal law are applicable to similar cases arising under the law of nations. The comity which is due to foreign States, does not require us to respect the acts of their administrative or judicial officers when they are contaminated with fraud, and still less where this fraud has deceived those very officers, and induced them to issue Spanish papers to a British | ship. In such p. 53
a case, even if a royal passport had been issued, we should have a right

to say, in the language of the common law, ' the King has been deceived in his grant.' A repetition of such transactions as the present case discloses, would bring the entire treaty into jeopardy. The honour and interest of both nations equally require that they should be repressed. The only mode of preserving the amicable relations between the two powers, is by judicial interposition, preventing the effect of such violations of the spirit of the treaty before they grow too mighty to be controlled by diplomatic remonstrance. Make these frauds successful, and encourage them by your decisions, and such violations will be frequent. On the other hand, by arresting them *in limine,* the presumed and declared purposes of the contracting parties will be fulfilled, and dissentions and hostilities prevented. That there must be some implied exceptions to the conclusive effect attributed to the passport by the letter of the treaty, is manifest. Such would be the case of a royal passport, signed in blank, obtained by corruption of the officer in whose custody it was, and filled up fraudulently, and applied to a vessel not entitled to the privilege. Here is a passport *de facto,* with all the solemnities upon its face, yet certainly examinable in this particular ; and if shown by extrinsic evidence to be thus fraudulently obtained and used, not only would the captors be excused from costs and damages for detaining the vessel, but she must be condemned under the ordinary rules of prize law.
p. 54 So that all the mischiefs of stopping vessels at sea may arise | notwithstanding this stipulation ; and, indeed, all such attempts to limit the range of maritime warfare will be found in practice to be quite illusory, unless, indeed, the capture of private property be entirely prohibited ; and even then contraband and breach of blockade must be excepted. A passport, as in the present case, actually filled up by the proper authority, and intended for the ship for which it is actually used, if issued upon false suggestions, is no more a legal passport than the one just supposed. The will of the grantor does not concur. The fraud makes it no passport.—But it is objected, that by the 18th article, the passport, if in due form, is to be conclusive when shown at sea, and the belligerent cannot detain the vessel after this document is exhibited. If the precise *letter* of the treaty be adhered to, this objection will be found to be groundless. ' If the *ships of the said subjects,* &c. shall be met with,' &c. ' the master or commander of *such ship* shall exhibit his passports concerning the property of the ship, made out according to the form inserted in this present treaty,' &c. Suppose a ship exhibiting such a passport, should be proved by other evidence found on board, not to be a ' *ship of the said subjects* ; ' then the letter of the treaty does not apply to her. If *not* a ' ship of the said subjects,' her passport is no absolute and conclusive protection. On the other hand, if the *spirit* of the treaty be regarded, the result is precisely the same. The intention

of the contracting parties was to protect Spanish ships, and not enemy ships; to give effect to the | maxim of *free ships, free goods*; not to make p. 55
enemy ships protect enemy goods. Even admitting, that the contracting parties meant to confide in the good faith of each other, that they would grant their respective passports only to their own vessels; still it is not to be supposed, that they meant to confide in the good faith of their enemies, that these last would not attempt to deceive their officers. It would, indeed, be an imputation on their good faith, to suppose that they wished such frauds to be successful. Every such national stipulation must receive a fair and reasonable construction. One which subverts its object, which encourages fraud and perjury, and makes the stipulation destructive to the rights of both parties, and benefits their enemies only, cannot be just. So pernicious a construction destroys all the advantages of the treaty. Look at its consequences to our belligerent rights. The passport, however obtained, and attended with whatever concomitant proof of fraud and falsehood, is supposed to be incontrovertible. However clumsy and barefaced the imposition may be, still it must prevail; and while our enemy is warring upon us in all directions, and by every means, we must suffer his trade to pass unmolested in his own ships, wearing a Spanish veil which disguises nothing, and only compels us to affect blindness. On the other side, the evils flowing from the interpretation we insist upon amount to nothing. The passport is still protecting evidence to all reasonable and honest purposes. The captor who disregards it, does so at the | peril of exemplary costs and damages, to be inflicted in p. 56
the discretion of the Court, according to the peculiar circumstances of every case. There is, then, the moral restraint of a great responsibility. It is sufficient to give protection where it is due, and was intended to be given. It provides for the consequences of slavish submission to the letter of the instrument on the one hand, and guards against vexatious interruptions of neutral commerce on the other.

2. But, if the document can be issued by any inferior functionary, the argument on the first point is entitled to still more weight. It is impossible to conceive that any nation would be so unwise as to consent that subordinate officers, at a distance from the sovereign authority, of great facility, surrounded by corrupt agents, or perhaps themselves corrupt, should grant such an omnipotent document, sacred, infallible, and conclusive even against the manifest fact and truth. Where is the authority of this Court to countenance the issuing of such a document, by an authority less than the highest? The treaty is here silent. If the *form* had been annexed, it would probably have made provision on this subject also. If this omission is to be supplied by construction, the Court will remember the high dignity and vast power of the document, and will not too easily confide in the responsibility of subordinate agents, remote

from the control of their sovereign. The passport now in question, professes to be issued ' for want of royal passports.' But why want them ?
p. 57 Their absence proves a want of confidence in the | officer who has here assumed the authority to substitute his own, for the passport of his prince. In the absence of any evidence of a right to exercise an authority so high, or of the fact that any royal passports had ever been entrusted to his distribution, the Court cannot recognize the validity of a document thus issued.

3. The 17th and 18th articles of the treaty, so far as they provide for the form and effect of passports, are inofficious and incomplete, for want of the annexation of the form intended. The 17th provides, that the ' passport shall be made out, and granted *according to the form annexed* to this treaty.' The ships of the two nations are to be ' provided with passports *as above mentioned*,' &c. ' *without which requisites* they may be sent to one of the ports,' &c. The 18th, stipulates that the master ' shall exhibit his passports, concerning the property of the ship, *made out according to the form inserted in this present treaty*, and the ship, when she shall have showed *such passport*, shall be free, and at liberty to pursue her voyage,' &c. So that there is nothing in these articles which gives a conclusive effect to any other passport than one, which it is impossible to have under the treaty, as the parties have left it. The first part of the 17th article does indeed give *some* of the qualities of the passport ; but it must have others, and they are unattainable by reason of the omission of the form. The Court then must either strike out the reference to a form, or imagine a form, and annex it. To do either, would be a high
p. 58 act of legislation, to which the Court is | incompetent. But let us try to discover the form ; and taking the 17th article for a guide, it must express the name, property, and bulk of the ship, and the name and habitation of the master. Still there are several things more to be ascertained. Who is authorized to grant the passport ? This is an essential circumstance ; is ascertained by the forms of passport annexed to several treaties ; and would probably have been expressed in this *form* had it been annexed. How is the proprietary interest to be stated : as the general property of the subjects of the state, or as the special property of some individual named ? Is the national character of the ship, as a part of the navigation of the country under whose flag she sails, sufficient ; or must it appear to be the property of subjects in general, or of some individual owner? Under what sanctions and solemnities, and accompanied by what proofs, is the document to issue ? These, too, are regulated by the forms annexed to several treaties, which were brought to the notice of the Court, at the former argument. The Court may supply these requisites, conjecturally, but it can have no assurance that it will not err, and defeat, instead of promoting the intention of the parties.

The stipulations of the treaty are nothing, and profess to be nothing without the form of passport. The contracting parties have made no effectual contract on this matter, without the form. The Court cannot finish, what they have left imperfect, any more than it could frame new articles, and insert them in the treaty. The contracting parties give conclusiveness to no passport | but one according to a form to be annexed. p. 59
The Court knows not what that form would have been. It might have explained, varied, or added to the requisites of the passport contained in the body of the treaty. Can the Court give conclusive effect to any other passport than the one intended to be provided by the treaty? If it can, the treaty would, to a certain extent, be made by the Court. But the judiciary has no portion of the treaty-making power under our constitution; and cannot exercise it under the pretext of interpreting treaties made by the President and Senate. Here is no room for interpretation. The language of the treaty is express and intelligible, as far as it goes. It creates but one *casus fœderis*. The Court cannot vary it, or superadd another. The 14th article of the Prussian treaty of 1785, contains a similar stipulation with that of the Spanish treaty. The passport is to express the 'name, property, and burden of the vessel, as also the name and habitation of the master, which passports shall be made out in *good and due forms*, (*to be settled by conventions between the parties, whenever occasion shall require*,') &c. Suppose that no such conventions were ever concluded, (and in fact they never were,) could the Court supply the form, or give effect to the stipulation in the treaty with Prussia? Yet the two cases are the same: for the omission of a convention settling the form, or, of the annexation of the form, equally fail to complete the stipulation. If one can be judicially supplied, why cannot the other? It is a gratuitous assumption to say, that by the non-annexation, the | parties intended to refer the form to each other's good p. 60
faith and discretion. If they had changed their minds in this respect, when they executed the treaty, a supplemental article would have been added: and the only fair inference from their silence is, that they meant to leave the stipulation of *free ships, free goods*, to support itself by the ordinary rules of evidence as to the property of the ship. The Court cannot alter the treaty by mere implication, and that too, not a necessary implication, for the non-annexation might have been the result of inadvertence. It might, also, have been the result of an intention to abandon the scheme of conclusive passports, or of passports more than usually efficacious, by omitting to perfect the treaty in that respect. If the defect proceeded from accident, the parties might have supplied it by a subsequent convention: and if they have not thought fit to do it, the proper inference is, that they did not wish to do it; and if wishing it, they have neglected it, they have no reason to complain that the Court acts upon

the treaty as it finds it. The inadvertence, therefore, was remediable in a regular manner, by the treaty-making power on both sides; and the Court has no right to say that it was not an inadvertence; or if by design, that it was not intended to leave the stipulation abortive as to the effect of passports. And where is the mighty mischief of leaving it unaccomplished? The great object of the treaty was the principle of *free ships, free goods*. Take away the conclusiveness of the passport, and that principle remains in full force. It stands in many a treaty without
p. 61 it. The passport would still | have its proper effect. It would be entitled to respect, as *prima facie* evidence, but it would not be conclusive against further examination. No doubt the public faith is to be preserved, but the care of it is devolved upon this Court to a limited extent only; the executive government is answerable for the rest. The jurisdiction of the Court to carry the treaty into effect, arises out of the constitution, which declares it to be the supreme law of the land, and it is only as a law that the Court can deal with it. Where a treaty gives a legal rule, the Court may enforce it directly in the exercise of its ordinary and regular jurisdiction. But where it fails to give such a rule, the Court is without power. As a Court of the law of nations, it cannot, by analogy to its equitable jurisdiction, supply the defective execution of a treaty, as Chancery supplies the defective execution of a power, or a trust. A Court of Equity supplies a remedy where there is a right merely equitable. It has a control over the parties to compel them to do justice, although there be no *legal* obligation. But this Court cannot deal with treaties in this manner. It must execute them as it finds them, since it acts upon them as written laws merely, and has no control over the parties to make them conform their conventions to their actual intentions. Suppose the United States had refused to make a convention providing the form of passports under the Prussian treaty, could this Court compel the Government to do it, or consider it to be done, because in equity it ought to be done? An equitable jurisdiction over treaties, implies a control over parties. But the |
p. 62 power of the Court over treaties is incidental merely; it makes the treaty act where it professes to act, and does not supply rules of conduct which the treaty does not give. Its province is interpretative, as in the case of other laws: and it can no more assume the treaty-making power, than any other legislative power.

4. But putting the last objection out of the question, the passport produced does not conform to the 17th article of the Spanish treaty. The requisition of the treaty is, that the passport shall state 'the name, *property* and bulk *of the ship*,' &c. '*that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties*,' &c. But this passport merely licenses the master, by name, 'to proceed in *his Spanish ship*,' &c. How does it appear by this that the ship is the property of any

subject of Spain? The words of the treaty, or absolute synonymes, are essential, and cannot be dispensed with without frustrating the object of the stipulation. Unless, therefore, the substituted words necessarily, and under all circumstances, mean the same thing, and give the same security to the belligerent, the departure is fatal. The pronoun '*his*,' as here used, does not relate to property, but to the official character of the master; nor is it pretended that he is owner. The words '*Spanish ship*,' do not necessarily denote Spanish property. Spain may adopt, or naturalize foreign vessels, for temporary, or for permanent purposes, without making their owners her subjects. Even a Spanish passport given to a vessel, documented in other respects as a foreign vessel, may be held to communicate | the Spanish national character. It depends on p. 63
Spain to make any vessels Spanish vessels, and thus to give the protection of her flag and pass to the whole navigation of our enemy. The words here substituted, do not then necessarily import the same with the words of the treaty; they are susceptible of evasion; they may be true, and yet the requisitions of the treaty remain unsatisfied.

Mr. *Harper*, contra, referred to the former argument on the part of the claimant and appellant on all the points, except that relative to the omission of the form of passport provided by the treaty, which he insisted did not defeat the conclusive effect meant to be attributed to the passport by the treaty. The construction contended for, on the part of the captors, would destroy the benevolent object of the contracting parties. It is highly improbable that the two nations would have suffered so important an alteration to be worked in their original intentions, either by an accidental or designed omission of the form of passport. The annexation could hardly have been omitted from negligence; and if the entire effect of the stipulation was meant to have been waived, the parties would have distinctly expressed this change in their views. The fair inference, therefore, is, that they meant to refer the form to each other's good faith, and to be satisfied if it contained a compliance with the substantial requisitions of the treaty. Under this confidence, our vessels have been furnished with the sea letter, and the vessels of Spain with a royal passport, or a passport substituted | for it by the Spanish authorities, to whom the p. 64
issuing of royal passports is entrusted, and containing the same particulars as to the property of the ship, &c., which the royal passport contains. It is not contended, that the passport may be issued by any Spanish authority, however inferior, or however alien his functions to the matter in question; but only by such officers as the Spanish Government authorizes to grant them. If, notwithstanding a vessel has such a passport or sea letter on board, she is liable to be interrupted in her voyage, and carried in for adjudication, under the ordinary rules of the Prize Court, independent of the conventional law, the object of the contracting parties

will be entirely defeated. It is true, that free ships will still make free goods; but if the freedom of the ship must be established by the tedious process of judicial investigation, notwithstanding the provisions of the treaty intended to exclude such investigation, very little will be gained for the security of neutral commerce. The terms used in the passport, with which this ship was furnished, are precisely synonymous with those of the treaty. The treaty does not say, that the passport shall express the individual proprietary interest of any particular Spanish subject, but that it shall express the property of the ship. How can a ship be a 'Spanish ship,' without being Spanish property? And how can it be Spanish property, without being the property of the subjects of Spain? This is the effect of the terms, as used in a policy of insurance, and other
p. 65 commercial transactions. A mere license to a foreign ship, | documented as a foreign ship, conferring on her the privileges of Spanish trade, by a fictitious adoption similar to that which gave rise to the British rule of 1756, relative to the colonial trade, would not make her a Spanish ship. And even if Spain should abuse the immunity conferred by the treaty, it is no reason why this Court should dispense with its obligations. It is for the legislative authority to determine when political considerations will justify this country in suspending any of the provisions of a foreign treaty. The Court must take the law from the treaty-making power, or from the higher legislative power dispensing with the obligations of a treaty.

The cause was continued to the next term for advisement.

February 22d, 1821.

At the present term the opinion of the Court was delivered by

Mr. Justice STORY. This cause was heard upon the whole evidence, introduced by both parties, at the last term; and as it embraced several points of great importance and difficulty, the Court, *ex mero motu*, directed one of those points to be reargued; and another, including a final construction of the Spanish treaty in matters of deep and universal interest, was reargued upon the application of the Government itself. The last argument was heard at so late a period of the session, that it was found impracticable for all of us to prepare deliberate opinions, and the cause
p. 66 was ordered by the Court to be | continued for advisement. The Court has now come to a result, which I am directed to pronounce.

A preliminary question was raised at the original argument, that the libel ought to be dismissed, because the capture was made without public authority, and by a non-commissioned vessel. Whether this be so or not, we do not think it material now to inquire. It is a question between the Government and the captors, with which the claimant has nothing to do. If the ship and cargo be enemy's property, it cannot be restored to the

claimant. If the captors make the capture without any legal commission, and it is decreed good prize, the condemnation must, under such circumstances, be to the Government itself. If with a commission, then it may be to the captors. But in any view, the question is matter of subsequent inquiry after the principal question of prize is disposed of; and the Government may, if it chooses, contest the right of the captors by an interlocutory application after a decree of condemnation has passed, and before distribution is decreed. The claimant can have no just interest in that question, and cannot be permitted to moot it before this Court.

Having disposed of this point, which, indeed, has been long recognised as a settled principle of the law of prize, the path is open for the consideration of the other points of the cause.

The captors contend, that the whole evidence establishes, that the ship and cargo are enemies property, the property of British subjects disguised under Spanish documents, and bound to a British port. | That the voyage p. 67
had its origin in London, and was to terminate there; and that the usual frauds of false papers, false destination, and suppression of evidence, have been resorted to for the purpose of giving a neutral character to hostile interests.

The counsel for the claimant deny the matter of fact, and assert, that the proprietary interest of ship and cargo is *bona fide* Spanish; and endeavour, with great ingenuity and force, to explain away the difficulties with which it is admitted, on all sides, this part of the cause is surrounded. If this ground should be thought not to be entirely and satisfactorily made out, the counsel for the claimant farther contend, that the ship was duly documented as a Spanish ship, according to the stipulations of the Spanish treaty of 1795; and that the effect of those stipulations is to preclude all inquiry into the proprietary interest of ship and cargo. Of the former, because the passport is conclusive evidence of the national character and ownership of the ship, which all persons are estopped to deny; of the latter, because, by the treaty, free ships make free goods, and the national character of the cargo becomes wholly immaterial.

To this point, which, if settled one way, is decisive of the cause, the counsel for the captors have given several answers. 1. That the passport of this ship was obtained by fraud, and this is always inquirable into, and vitiates all, even the most sacred instruments and records. 2. That the passport is not conformable to the treaty, not having been issued by royal authority, or authenticated by the royal Government, | but issued by p. 68
a mere colonial Governor; and that, such as it is, it does not state the ship to be *owned* by Spanish subjects, which is indispensable under the treaty. 3. That the substituted proof required by the 17th article of the treaty, where the passport is not regular, must be such as is subject to the thorough examination of the Prize Court. 4. That the form of the pass-

port, referred to in the 17th article of the treaty, never having been annexed to it by the contracting parties, that article, so far as it purports to give any effect to passports, is inoperative and imperfect, and the imperfection cannot be supplied by any judicial tribunal.

Such are the leading propositions, pressed with great ability and earnestness into the discussion of this cause, by the respective parties. They embrace principles of international law of vast importance; they embrace private interests of no inconsiderable magnitude; and they embrace the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our Government could not violate without disgrace, and which this Court could not disregard without betraying its duty. It need not be said, therefore, that we feel the responsibility of our stations on this occasion, and that in delivering our opinion to the world, we have pondered on it with great solicitude and deliberation, and have looked to consequences no farther than the sound principles of interpretation and international justice required us to look.

The point to which the Court will first direct its attention, is that last
p. 69 made, viz. whether the 17th | article of the treaty of 1795, so far as it respects passports, is inoperative and imperfect in consequence of the omission to annex the form of the passport to the treaty. This is a very delicate and interesting question.

The 17th article provides, 'that in case either of the parties hereto shall be engaged in a war, the ships and vessels belonging to the subjects or people of the other party, must be furnished with sea letters or passports, (*patentes de mar o pasaportes,*) expressing the name, property, (*propiedad,*) and bulk of the ship; as, also, the name and place of habitation of the master or commander of the said ship, that it may appear thereby, that the ship really and truly belongs to the subjects of one of the parties, *which passports* (*dichos pasaportes*) *shall be made out and granted according to the form annexed to this treaty.*' The article proceeds to declare, 'that such ships, being laden, are to be provided not only with passports, as above mentioned, but also with certificates containing the several particulars of the cargo, the place whence the ship sailed, that so it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; and if any one shall think it fit or advisable to express in the said certificate, the person to whom the goods on board belong, he may freely do so; *without which requisites* they may be sent to one of the ports of the other contracting
p. 70 party, and adjudged | by the competent tribunal, according to what is above set forth, that all the circumstances of the above omission, having been well examined, they shall be adjudged to be legal prizes, unless they shall

give legal satisfaction of their property by testimony entirely equivalent.' In point of fact, no form of a passport was made out and annexed to the treaty. The case, then, now before us, is not within the *letter* of the treaty, for as no form is prescribed, the documents found on board cannot be compared with any form; and until that comparison is made, it is impossible to say whether the stipulations originally intended by the treaty have been exactly and literally complied with or not. There is no room here left for interpretation, on account of ambiguous language of the parties. They have expressed themselves in the clearest manner, and it is to the passport, whose form is to be annexed to the treaty, and to none other, that the effect intended by the treaty, whatever that may be, either as conclusive or *prima facie* evidence of proprietary interest, is attributed. Into the reasons why this form was omitted to be annexed to the treaty, we are not permitted judicially to inquire. It may have been by accident, or by design, from difference of opinion as to what should be the solemnities accompanying it, or from a willingness to leave it to future negotiation. Can this Court annex a form to the treaty? Can it supply the deficiency of the treaty, and give effect to it in the same manner, as if no form were referred to? Can it look to the stipulations, and decide for itself what the parties regarded as substance, and what as mere form? | Can it say that the stipulations in the text would have p. 71
been agreed to without the auxiliary form of the passport? Can it decide judicially, that under no circumstances the form of the passport could be of the essence of the stipulations? These are grave questions, and are not to be lightly answered. They deserve and require deliberate consideration. We have given it; and our opinion will now be delivered.

In the first place, this Court does not possess any treaty-making power. That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. The parties who formed this treaty, and they alone, have a right to annex the form of the passport. It is a high act of sovereignty, as high as the formation of any other stipulation of the treaty. It is a matter of negotiation between the Governments. The treaty does not leave it to the *discretion* of either party to annex the form of the passport; it requires it to be the *joint* act of

p. 72 both; and that act | is to be expressed by both parties in the only manner known between independent nations—by a solemn compact through agents specially delegated, and by a formal ratification.

Nor is there any thing strange or singular in leaving matters of this sort to be settled by future negotiations. In our treaty with Prussia of 1785, the 14th article contains a provision as to passports, in substance like that of the 17th article of our treaty with Spain, except that it declares that these 'passports shall be made out in good and due form, to be settled by conventions between the parties, whenever occasion shall require.' This stipulation manifestly contemplates that the form of the passport is to be a solemn act of the treaty-making power of both Governments, and that neither Government has authority in its discretion to use a form which shall be binding, without its consent, upon the other contracting party.

In the next place, this Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to
p. 73 the essence or the modal | parts of the treaty, equally give the rule to judicial tribunals. The same powers which have contracted, are alone competent to change or dispense with any formality. The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret or enforce them. We can as little dispense with forms as with substance.

In the next place, we cannot admit that the annexation of the form of the passport was, in itself, (supposing we had a right to inquire into it) a matter of small moment or importance, so that the omission could be dispensed with, as not belonging to the *substance* of the treaty. It was competent to the parties, by the particularity of the form, to have qualified the general expressions of the article, and to have made that determinate, which, upon the face of the article, stands indeterminate. It is, for instance, indeterminate upon the face of the article, whether there is to be a specification of the names of the owners of the ship, or only a general declaration that the owners are Americans or Spaniards. It has also been contended here, and is certainly susceptible of doubt, whether the passport was to express the individual ownership, or the national character of the ship. So the solemnities to be observed in

granting the passport, the oaths to be made by the parties, the persons by whom they were to be verified, are all left indeterminate by the treaty. These might have been, and looking to the requisitions of other treaties, must have been explained and settled by the form annexed | to this treaty. p. 74
The 25th article of the Dutch treaty of 1782, is substantially the same as the 17th article of the Spanish treaty; and the form of the passport, certificate, and sea letter annexed to that treaty, reduce to a perfect certainty every circumstance which has been already mentioned. Other qualifications and limitations might have been added, in the pleasure of the parties. It is impossible, therefore, for this Court, judicially, to say what such passport might or would have contained. We may indeed conjecture, but in this conjecture we may err; and to assert what it would be, *in literis*, would be to exercise a sovereign control over the compact itself.

Nor are the circumstances already stated, mere form, or diplomatic ceremony. They might well have entered into the very substance of the stipulation. The counsel for the claimant alleges, that the passport, intended by the treaty, was to import perfect, unimpeachable verity; that it was to have a sanctity beyond that which is granted to any other solemn instrument. Fraud would not vitiate it, nor the most direct, unequivocal breach of good faith, or abuse of the passport, bring its protecting virtue into question. Assuming for the purpose of argument, that this is true, the form of the passport, and the solemnities accompanying it, were of the deepest interest and importance to both nations. It was vital to the treaty; vital to the acknowledged rights derived under the law of nations. The immunity intended by the treaty, in this view of it, was a derogation from the general belligerent rights of both parties. They might be willing to confide the issuing | of such passports to the p. 75
Spanish high officers of state with the royal approbation and signature, or with the corresponding signatures of our own Secretary of State and President. They might have full faith and confidence, that under such guards, the danger of abuses would be very much diminished, if not entirely checked. But they might not be willing to trust to the integrity, discretion, and watchfulness of subordinate agents; to officers of the customs; to colonial Governors, or commanders in distant Provinces. In point of fact, our own passports have issued under the authority and signatures of our highest executive officers. What reason has this Court to presume that our Government would accept of a verification by inferior officers of Spain? What reason has this Court to presume, that our Government would have been satisfied with a passport signed by a colonial Governor for want of royal passports? It has not been so stipulated in the treaty. It has not, in terms, dispensed with the annexation of the form of the passport to the treaty. Even if one Government

had been willing to dispense with it, it remains to be shown, that the other was also willing. And if both were willing, it would still remain to be shown, that the act of dispensation was consummated by a solemn renunciation; for the obligations of the treaty could not be changed or varied but by the same formalities with which they were introduced; or at least by some act of as high an import, and of as unequivocal an authority. All that can be said in the present case, is, that the subject
p. 76 of the annexation of the passport was taken *ad* | *referendam* by the parties. They had competent authority so to do; and this Court is bound to presume, that they had good reasons for their conduct. It is far more consistent with every fair interpretation of the acts of the Government, to suppose, that the form of the passport was postponed with a view to the suspension of the article until the subject was more deliberately considered, or could be more conveniently attended to, than to suppose that words of reference were used without meaning, and forms carrying with them such important and interesting solemnities, and such obligatory force and dignity, were hastily abandoned at the very moment they were studiously sealed to the text. Unless this Court is prepared to say, that all forms and solemnities were useless and immaterial; that neither Government had a right to insist upon a form after having assented to the terms of the article; that a judicial tribunal may dispense with what its own notions of equity may deem unimportant in a treaty, though the parties have chosen to require it; it cannot consider the 17th article of this treaty as complete or operative, until the form of the passport is incorporated into it by the joint act of both Governments.

Upon the whole, it is the opinion of the Court, in which opinion six judges agree, that the form of the passport not having been annexed to the 17th article of the treaty, the immunity, whatever it was, intended by that article, never took effect; and therefore, in examining and deciding on the case before us, we must be governed by the general law of prize. |

p. 77 This view of the case renders it unnecessary to consider the other points made by the counsel for the captors, as to the effect of the treaty; and we therefore give no opinion upon them.

It remains then to consider whether the ship and cargo, now in judgment, are, in fact, neutral or hostile property. The facts are extremely complicated, and the evidence, in many instances, clashes so as to forbid all hopes of reconciling it. It cannot be disguised too, that the claim is involved in much perplexity, and is shaded by some circumstances that have not been entirely cleared away. If it were not a task from which we could derive no general instruction, the whole evidence might be minutely examined, as to the questions of false destination, suppression of papers, and use of false papers. But the labour would be very great,

and after all, would conduce to no important purpose. We shall content ourselves, therefore, with a brief statement of the result of our opinion.

It is to be recollected, that by the settled rule of Prize Courts, the *onus probandi* of a neutral interest rests on the claimant. This rule is tempered by another, whose liberality will not be denied, that the evidence to acquit or condemn, shall, in the first instance, come from the ship's papers, and persons on board; and where these are not satisfactory, if the claimant has not violated good faith, he shall be admitted to maintain his claim by farther proof. But if, in the event, after full time and opportunity to adduce proofs, the claim is still left in uncertainty, and the neutrality of the property is not established | beyond reasonable p. 78
doubt, it is the invariable rule of Prize Courts to reject the claim, and to decree condemnation of the property. There is another rule too, founded in the most salutary and benign principles of justice, that the assertion of a false claim, in whole, or in part, by an agent of, or in connivance with the real owners, is a substantive cause of forfeiture, leading to condemnation of the property. These principles are not alluded to in this case, for the purpose of founding our present judgment upon them; for we do not rely upon it as a case merely of reasonable doubt; but to show that a case less strong might justly have supported the decree, we feel ourselves bound to pronounce—of condemnation.

We cannot resist the conclusion, looking to the whole evidence, that this is a case where the whole mercantile adventure had its origin, in the house of trade of Messrs. Von Harten and Gobel, a house domiciled in London. The ship was, beyond all question, a foreign ship; but of what nation, and in whose ownership at the time when she acquired her ostensible Spanish character, is studiously concealed. She came just before her naturalization from New Providence; and that naturalization was procured, as we feel ourselves constrained to believe, by an imposition practised upon the Spanish judicial authorities, by means of a pretended lien under a bottomry bond, supposed to be given for repairs. The holder of the bond procured a judicial sale of the vessel, became himself the purchaser, and afterwards obtained the Spanish character by a negotiation with the Spanish Colonial Government, | making awkward apologies for p. 79
his asserted ignorance of the former ownership, and endeavouring to allay the well-founded distrust of that Government. To this very hour the claimant has observed a profound silence on this point, a source of just and pregnant suspicion, although he has loaded the cause with documentary proofs and affidavits on other points. He has not chosen to give any information as to the origin of the bottomry bond, or former ownership of the vessel, or of the circumstances under which the supposed lien was acquired. Yet these facts would seem to have lain immediately within his reach. On board, too, of the vessel at the time of the capture,

was the special and confidential agent of Messrs. Von Harten and Gobel, and also the brother-in-law of Mr. Von Harten. Some papers were thrown over board, others were concealed, and others spoliated. The testimony of the witnesses upon the standing interrogatories, was far from satisfactory; and it is extremely difficult to exempt the agents on board the vessel from the imputation of designed suppression of facts and prevarication. The claimant, Mr. Munos, is the father-in-law of Mr. Gobel, and claims this very valuable shipment as his own property, asserting himself to be a merchant now engaged in business. And yet it is proved by a weight of testimony that seems difficult to resist, that Mr. Munos has not been known to be engaged in commercial business on his own account for at least fifteen years before the time of this shipment. And it is established in the most satisfactory manner, and is indeed admitted
p. 80 by the claimant himself, | that on account of the foreign character of Mr. Gobel, (the son-in-law of Mr. Munos,) all the foreign business of Mr. Gobel has been constantly carried on for several years under the cover of Mr. Munos. These are a few of the extraordinary facts of this case, and combining them with the indications of the papers found on board, and the suppressed documents which have reached the light; the vehement presumption, and almost written proof, that Mr. Gobel, the admitted partner of the English house of Von Harten and Gobel, was the stationed agent of that house at the Havana; and the fact, that the destination was alternative, or double, to London or Hamburg, or both; the conclusion is difficult to overcome, that the cargo was the property of Messrs. Von Harten and Gobel, or some other unknown enemy proprietor, and covered by the Spanish character of Mr. Munos. And the Court is constrained to consider the proceeding at the Havana as mere machinery to naturalize an enemy's ship, and that the ship, either previously belonged to Messrs. Von Harten and Gobel, or some other enemy proprietor, or was purchased at New-Providence on his or their account. It is perfectly immaterial whether Mr. Munos had any subordinate interest in the ship and cargo or not. If his claim be substantially false in the manner in which it is framed, having been adopted by him, he has justly incurred a forfeiture of any such interest, by attempting an imposition upon the Prize Court.

It is the judgment of the Court, that the decree of the Circuit Court,
p. 81 condemning the ship and cargo, | be affirmed, with costs. From so much of this opinion as respects the question of *proprietary* interest of vessel and cargo, three Judges dissent.

Mr. Justice JOHNSON. This is an appeal from the sentence of the Circuit Court of North Carolina, condemning this vessel and cargo as prize of war to the Roger privateer.

The condemnation below appears to have proceeded on evidence of an

hostile interest existing in the ship. For, as to the cargo, it is not denied that the proprietary interest is immaterial; since, if the ship be Spanish, the existence of an enemy interest in the cargo, does not affect it. Yet, much of the evidence and argument have been introduced to prove the existence of an hostile interest in the cargo; but it has been with a view to maintain two positions: 1st. That it is a strong circumstance to prove the vessel to be British property; and, 2d. That, though it be not enemy owned, yet, as both vessel and cargo are claimed by the neutral, if it be proved that he has attempted a fraud, the penal consequence is the forfeiture of his own interest.

It cannot be denied, that there are many circumstances in the case, going strongly to prove too intimate a connection, between this adventure, and the mercantile transactions of the house of Gobel, consisting of Gobel and Von Harten, a British merchant. Nor is it entirely clear that Rahlives, who appears in the machinery as supercargo, is not himself a participator in interest. If I felt myself now called upon to decide this case on the ordinary principles | which govern the decisions of Prize Courts, on p. 82
neutral claims; it must be acknowledged, that there is a good deal of evidence which must be rejected, in order to clear it from the tissue of difficulties in which the circumstances involve it. Yet there is one important consideration which rides over all the unaccountable combinations of interest which present themselves to the view of the Court. Why should British property on board a Spanish vessel have been disguised as Spanish? There are obvious reasons why Spanish property should have been disguised as British; for, it would have afforded protection against the only enemy a Spaniard had to fear—the patriot privateer. But, as England was at peace with all the world except America, and enemy property secure from American capture in a Spanish vessel, it is difficult to conceive a reason why this disguise should have been thrown over a British cargo. The course, however, which I will pursue in coming to a conclusion, precludes the necessity of disentangling the web, in which the interests of the claimant are wound up by the various circumstances of the destruction, mutilation, and concealment of papers, and the questionable shape in which several of the actors in the drama present themselves to the view of this Court.

The claimant founds his right to restitution, on his Spanish character, and the sufficiency of his Spanish documents under the treaty. The captor contends, that the documents found on board, were not of the first order under the treaty, and that when let in to | the production of substitutes, p. 83
a plenary inquiry is opened into proprietary interest.

Before entering upon these more general questions, it is necessary to take notice of a preliminary ground of condemnation, which, if it can be sustained, anticipates every other inquiry. It appears, that the vessels

left the Havana under convoy of a British frigate, and, it is contended that this circumstance is, *per se*, a ground of condemnation.

This is, at least, a new ground in this Court ; and it cannot be expected that it will meet with a very favourable admission from a Court which has manifested no disposition to multiply causes of condemnation. Without being supposed to express any inclination to adopt the principle, I deem it sufficient to remark, that if it could be admitted, it ought not to be applied to a nation which needed that protection against an existing and enterprising enemy ; and which ought, therefore, to be considered, as having sought it for that purpose, and not against a neutral, whose principles of conduct it had then no reason to distrust. The Gulph of Florida, at that time, swarmed with patriot privateers ; and the convoying ship had, moreover, parted from the fleet before this capture was made. The conduct of this vessel was perfectly pacific when overhauled by the American cruiser. The utmost to which the Courts of Great Britain have gone, has been to affect the merchant vessel actually taken under convoy, with the resistance or character of the convoying ship ; and when such a case shall occur, it will be time enough for this Court to determine on
p. 84 the course it | will adopt. At present I feel no inclination to go so much beyond those decisions as has been here contended for.

On the principal question, it appears, that this vessel was provided, at the time of her sailing, both with a passport and certificate of her cargo. That these papers were on board at the time of the capture, cannot be doubted ; they were both delivered by the captain to the Registrar of the District Court, the former marked A. No. 7 ; the latter, B. No. 1. Some doubt arises whether they were both exhibited prior to the capture ; but this is wholly immaterial in the question of condemnation.

In behalf of the claimant it is contended, that on the production of the passport and certificate, or bill of lading of the cargo, he is entitled to restitution. To this the captor objects, that the 17th article of the treaty with Spain, contemplated a form of passport intended to be attached to that treaty ; that as no such form was settled by the two nations, the claim must rest altogether upon the provisions of the 15th article, and the proprietary interest is to be inquired into as in ordinary cases. But, if the contracting parties are to be permitted to devise forms of passports for themselves severally, then that this is not a passport in the language of the treaty, but a substitute for one, and is defective in not expressing unequivocally that the ship was Spanish property.

On this part of the case it is proper to remark, that it is not always easy for the criticising eye of the common law, to expand to the enlarged
p. 85 views and | remote perceptions which should govern the mind in the construction of treaties. Yet nothing could be more inconsistent with international law, than to apply to such instruments those scrutinising

principles, which enter into the construction of a special plea or a criminal statute. From history, analogy, and policy, as well as language, are to be gathered the views of the contracting parties; and however either may be pressed by the application of conventional stipulations to particular cases, or under particular circumstances, not less is the obligation to execute them in a spirit, not only of good faith, but of liberality. Where no coercive power exists for compelling the observance of contracts but the force of arms, honour and liberality are the only bonds of union between the contracting parties, and all minor considerations are to be sacrificed to the great interests of mankind.

In the case before us, I see no reason for nullifying the operation of the 17th article, for want of the form which was in contemplation to be drawn up and attached to the treaty. The substance of the passport intended to be prescribed, is so copiously exhibited, as to render it a matter of the simplest effort to throw it into form. This, no doubt, was the cause why the contracting parties manifested so much indifference about carrying their intention into effect. I am, therefore, content to give the same effect to any instrument complying substantially with this article, as ought to have been given to a passport in a prescribed form. What is that effect? |

This is easily ascertained by comparing the provisions of the 15th, p. 86
17th, and 18th articles. By the 15th, the principle is established, that free ships shall make free goods, and that several branches of commerce which the modern law of nations has prohibited to neutrals, shall notwithstanding be freely prosecuted. But, knowing the endless litigation which questions of proprietary interest give rise to, and the sad depravity of morals exhibited by witnesses in Prize Courts, the enlightened statesmen who formed that treaty, resolved, by the 17th and 18th articles, to make the freedom of the ship to rest upon documentary evidence in the first instance, and evidence of property in those cases only, in which the vessel was unprovided with the necessary documents; that each nation should be sovereign to judge for itself in conferring upon its own vessels the immunity secured by the treaty, and that the acknowledged right of adjudication in the Courts of the capturing power, should be superseded, when a vessel was found on the ocean provided with the documentary evidence stipulated for by treaty; and only revert, when the vessel, being unprovided with such documents, was obliged to resort to evidence of property of a less solemn nature.

It is contended, that this is yielding an important national right. What if it is? It is a mutual relinquishment, and one made by the Government, not by this Court. And although it operate against us now, the time may come when the comity of Spain, or her colonies, may extend the benefits of it to the commerce of this country. But, be that as it may, |

p. 87 if the relinquishment has been made, it is incumbent on us to observe it. And although it may not be so sensibly felt at present, the time is scarce gone by when it was thought a highly beneficial stipulation to this country. Spain was, at the date of that treaty, a respectable naval power. Her relations with Europe and the Barbary powers, often involved her in wars. America abounded with ships and seamen, and her prospects were favourable for the enjoyment of peace. To carry on the commerce of the West-Indies and Mediterranean, as the favourite carriers of belligerent cargoes, was, therefore, to us, a highly flattering object. And though occasional impositions might be practised, it was, comparatively, a trivial consideration, and the chances mutual. When abuses should become flagrant and intolerable, it would have presented a just cause for dissolving the treaty; but it does not rest with Courts of justice to dissolve a treaty.

As to considerations drawn from the impolicy of discouraging the spirit of cruizing, I attach to them very little importance. The most serious doubts may well be entertained of the policy of giving encouragement to that species of enterprise. Certain it is, that no nation can pursue it long without feeling its demoralizing influence. It draws together a race of men, from every quarter, who want for nothing but a legal pretext for indulging their appetite for blood and violence; and while their habits and examples become popular, the rapid fortunes which are occasionally acquired, render the most valuable classes of a community
p. 88 dissatisfied with seeking | competence by the slow progress of useful labour. It will not, perhaps, be too much to say, that this country is, at this time, experiencing something of the baneful effects which flow to the world from letting loose the passions of men to gratify themselves with plunder. But, be this as it may, it is the direct object of these articles, of this treaty, to cover commerce from capture; and if a treaty is to be construed with a view to effectuate its intent, that construction which will afford the most ample protection to commerce, will be most consistent with the views which dictated this treaty. Could the language of the treaty leave a doubt on this subject, it is historically known, that the policy of the United States, at the time of its date, was, if possible, to annihilate the right of cruizing against commerce. With many ships, and a most flourishing trade, she had not a vessel of war; and while every other nation was likely to be embroiled in wars, her policy was peace, and her prospects favourable to the enjoyment of it. To become the carriers of the world, was the object to which her negotiations were directed; and could she have obtained the same stipulation from all the rest of the European nations, she must have succeeded greatly.

The example of other nations in the construction of treaties is brought to the notice of this Court. But, besides that the analogy in the cases

referred to is very remote, I cannot admit the force of any example that contravenes general principles. It is a melancholy truth, that nations and their Courts are too often inclined to restrict or enlarge construction, | under a temporizing policy suggested by the pressure or allurement of p. 89 present circumstances. I will endeavour to give this treaty the same construction against an American captor, as ought to be given it in the Courts of the opposite contracting party. And the day may arrive when American commerce will have no cause to regret that our Courts have pursued liberal and enlarged views in adopting this construction.

On the exceptions taken to the form of the passport it is to be observed, that on the face of the instrument it is declared to be issued in default of royal passports. From this circumstance, a doubt arose whether it was an instrument of the highest authority. This led to an inquiry at the highest sources of information relative to the powers of the Governor of Cuba to issue such passports. From the information thus obtained, I am satisfied that his powers are amply sufficient to support the authority of that document. Some very serious doubts also have been raised relative to the form of the instrument, particularly that passage of it which has relation to the national character of the ship. The treaty requires that it should set forth *the name, property, and bulk of the ship; also, the name and habitation of the master, or commander.* These requisites are all minutely complied with, unless we except that part which relates to the property of the vessel. The words used with that view are simply *fragata mercante Espanola*; and a doubt has existed whether this be a sufficient affirmance of the property or national character of the vessel. Nor has this doubt | been removed without a careful reference to the p. 90 passports of various nations. The result is, that in all of them the affirmative is general, without specifying the individual proprietor. It is also in evidence that this is the form known and used in Spain and her colonies, as the passport of regularly documented and acknowledged Spanish vessels; and I feel myself bound to receive and acknowledge it as sufficient in form and substance.

Thus far the opinion was written, and prepared to be delivered, prior to the argument ordered at the instance of the Executive. I have seen no reason to change a word of it, from any thing since heard. On the contrary, the last argument has fully confirmed me in its correctness. Thousands of imaginary cases of fraud and collusion, have been suggested to alarm the Court; and it may be, that our Government, having now a prospect of becoming a respectable naval power, and having experienced the activity and enterprize of our privateers in the late war, may feel less disposed to promote the principles of the armed neutrality, than they did formerly. This conviction of former error has generally grown out of the same change of circumstances in other states. But it is not through

the medium of Courts of justice that this change of sentiment is to develope itself. If this treaty was ever binding, it is equally binding now; and in adjudicating between individuals, the same rules which would ever have been applicable, ought to be religiously adhered to, under all possible changes of interest or policy.

p. 91 But the interests and apprehensions so eloquently | pressed upon the notice of this Court are not real. They are factitious; and may have their effect on a client's cause, but they are not the well understood interest, or the well founded apprehensions of the Government. The execution of one treaty in a spirit of liberality and good faith, is a higher interest than all the predatory claims of a fleet of privateers.

What has this country to fear? A practical answer is always most satisfactory on such a question; with similar treaties existing with various other powers, what real injury was sustained in the late war? The truth is, and every one conversant in national policy well knows, that there is always less danger of imposition in reality than a limited view of the operation of such a stipulation would suggest. It is not the interest of the belligerent to foster the carrying trade of a commercial rival; hence, Great Britain would rather, in time of war, compel her own vessels to sail under convoy, than permit her merchants to use a neutral bottom. Nations are generally jealous of permitting foreigners to hold domestic tonnage, or use domestic names. There are, commonly, privileges of trade attached to the ship's character, and severe laws enacted against a practice which is always viewed as a fraud upon the Government whose flag is thus acquired. Witness the severity of our own laws in such cases.

If there is any nation in the world more interested than all others in the liberal support of the doctrine contended for by this claimant, it is the United States. Our chances of enjoying peace are much greater than

p. 92 any other; and if there be a tendency | to war, it is with a nation which will not be driven to the necessity of making use of neutral bottoms. I cannot, therefore, really see why our administration should have been so seriously alarmed at the prospect of our deciding in favour of this Spaniard, as has been urged upon this Court.

But, considerations of policy, or the views of the administration, are wholly out of the question in this Court. What is the just construction of the treaty is the only question here. And whether it chime in with the views of the Government or not, this individual is entitled to the benefit of that construction.

The more I have examined this subject, the more thoroughly I have been convinced that my view of the construction of the treaty is the correct one, viz. that national protection was to depend upon authentic documents, and not proprietary interest; or more correctly, that each nation should be restricted from looking beyond those documents. There

is one provision contained in all these treaties, which sets this point, in my opinion, beyond all doubt. Which is, that in the case of convoy, the word of the commander of the convoying ship is to be taken conclusively for the neutral character of every vessel in the fleet. This is the substitute in the case of a fleet for the passport of a single vessel. I speak of authentic documents ; for the absurdity never was imagined that a passport stolen or seized by violence was to have the force of one regularly issued.

But it is contended, that it is due to Spain to pursue these inquiries into proprietary interest, and due to the peace of both nations that such questions | should be examined in Courts of justice, rather than leave them p. 93
to be the subjects of diplomatic remonstrance. This is a specious, but very unsound argument. Have not the vexations of Courts of Vice-Admiralty, and the violence of armed cruisers, been the pregnant sources of half the commercial altercations of the last century ? This was the evil intended to be remedied, and whatever impositions might flow from the remedy, it was well understood, that the benefits of a commerce uninterrupted by the cupidity of cruizing vessels, would more than compensate. There is one consideration, which, on this subject, is conclusive. No Sovereign can appear in Courts of justice to defend his subjects, and it was, therefore, that a method was devised for taking such questions from Courts of justice if possible, and referring them to another tribunal. Every stipulation in the treaties of that day, teems with the project of ridding commerce of vexatious capture, and more vexatious litigation. A better practical illustration of the wisdom of such a measure cannot be imagined than that which the present case presents.

But it has been earnestly and successfully contended, that if such was the intention of the treaty, it must fail altogether for want of the form of a passport, contemplated in the 17th article.

Yet if there is any one question more clear of doubt than all others, I think it is this. For the fallacy of the proposition admits almost of mathematical demonstration. This omission must have been the result of either accident or design. It may have | proceeded from accident between p. 94
the negotiators in Europe ; but after the receipt of the treaty, and its submission to the Cabinet and the Senate here, the omission could not have been the result of accident when it received the sanction of our government. It must then have been designedly omitted by our constituted authorities. And for what purpose ? Will any one presume to suggest that it was a deliberate fraud upon the other Government ? calculated to leave our Courts at liberty, on some subsequent day, to declare the 17th and 18th articles in effect void ? Did we hold out to them the idea of having adopted the provisions of those articles into our national code, when we were conscious that they contained an innate vice, calcu-

lated to defeat every beneficial effect? If the argument on this point could meet the sanction of our Government, I would blush for it. From the advocate of a captor, it might have been expected; but cannot lay claim to the sanction or countenance of the American Government. I am sensible that the cabinet would disavow such a doctrine.

But, it is urged with much emphasis, that we have no right to annex a form, or to add a clause to the treaty. It is not contended that we have. No member of this bench entertains such a thought. But why may not the contracting parties supply one? All the requisites being prescribed in language, the form and the substance are the same thing. If the contract is complied with, what matters form? Whether it is substantially complied with or not, must be a question for the Courts of the contracting
p. 95 parties. But how ridiculous would it be, to be trying | form, and shape, and size, like the ignorant Arab, where the treaty is substantially complied with. Had it merely stipulated, that a passport, in a form prescribed, should be given mutually, there would have been something in the argument; but in expressing with precision the substance of the instrument to be given, it renders the devising of a form a mere work of supererogation. If no other conclusion is to be drawn from its omission, certainly this may, that it was too trivial to be remembered.

In order to support the argument, that the absence of the form nullifies the 17th and 18th articles of this treaty, the attention of this Court has been drawn to the provisions of the 14th article of the treaty with Prussia. And it has been contended, that until a form of a passport be adjusted between the two nations, that article is also a dead letter. The construction is one which could not be supported even on a common law instrument. The words are, ' which passports shall be made out in good and due forms, (to be settled by conventions between the parties whenever occasion shall require.) ' If the Spanish treaty is to be construed by analogy to this, the argument is directly on the other side. For these words, obviously leave ' the good and due forms ' of these instruments to be devised by the parties severally, and only stipulate for settling a form by convention, ' *whenever occasion shall require* ; ' that is, whenever either shall be dissatisfied with the form used by the other. The nations which, in the very same article, could repose such implicit faith in each
p. 96 other's candour, as to leave the neutrality of | whole fleets to be determined on the word of the convoying officer, merit more the confidence of each other, than to have imputed to them an evasion so obvious.

As it became indispensable to assign some reason for retaining these two articles in the treaty, if they were to be held a dead letter for want of the form, it has been suggested, that the only operation intended by them was to prescribe a law to the caprice or violence of cruisers, and subject them to more exemplary punishment than in ordinary cases.

No one who reads and compares these four articles, the 15th, 16th, 17th, and 18th, and considers the historical events in which they originated, can for a moment suppose, that this was the object which led to the insertion of the two latter of those articles. The intention was to ingraft into the law of nations a great and a new principle. And although power and cupidity may affect to sneer at it, and melancholy experience cannot dismiss the apprehension, that it is too etherial to subsist in this nether atmosphere, yet it is one which philanthropy will ever cling to, and justice cherish. To ingraft into this treaty the principles of the armed neutrality was the object, and for this purpose the 15th article declares those principles in detail. The 16th furnishes the exceptions to them; the 17th prescribes the evidence on which those privileges shall be conceded; and the 18th, after regulating the conduct of cruisers towards vessels so protected, proceeds to declare, that 'the ship, when she shall have showed such passport, shall be free, and at liberty | to pursue her voyage, so as it p. 97 shall not be lawful to molest or give her chase in any manner, or force her to quit her intended course.' It is impossible for language to be stronger. That the violation of these stipulated privileges, would aggravate the punishment to be inflicted on cruisers, is a consequence of the thing provided for, not the thing itself.

Upon the whole, I am decidedly of opinion that the claimant is entitled to restitution. Nor should I find much difficulty in supporting his right on the ground of proprietary interest. But entertaining the opinion that I do on this preliminary point, there is no necessity to examine into this part of the case.

Sentence affirmed.

March 6th.

Mr. *Harper*, for the claimant and appellant, moved to vacate the decree of condemnation entered in this cause, and that it should be again continued to the next term in order to enable the claimant to procure farther proof as to the annexation of forms of passports to the original Spanish treaty, and read an affidavit annexed to a printed copy of the treaty, published at the royal printing-office in Madrid, which contained two forms of passport, which will be found in the margin.[1] |

[1] *Modelo del Pasaporte, ó Patente de Mar que se concede á los Buques para navegar en América, citado en el Articulo XVII.*

Don Carlos, por la Gracia de Dios, Rey de Castilla, de Leon, de Aragon, de las dos Sicilias, de Jerusalem, de Navarra, de Granada, de Toledo, de Valencia, de Galicia, de Mallorca, de Sevilla, de Cerdeña, de Córdoba, de Córcega, de Murcia, de Jaen, de los Algarbes, de Algezira, de Gibraltar, de las Islas de Canarias, de las Indias Orientales y Occidentales, Islas y Tierra-firme del Mar Océano; Archiduque de Austria, Duque de Borgoña, de Brabante y Milan, Conde de Abspurg, Flandes, Tirol y Barcelona, Señor de Vizcaya y de Molina, &c.

Por quanto he concedido permiso á para que con su nombrado de porte de Toneladas, pueda salir del Puerto de con carga, y registro de efectos de comercio, y transferirse

p. 98 The motion was opposed by the *Attorney-General* and Mr. *Wheaton*, for the captors and respondents. |

al y restituirse á España al Puerto de con expresa condicion de hacer su derrota de ida y vuelta directamente á los señalados parages de su destino, sin extraviarse, ni hacer arribada á Puertos Nacionales ó Extrangeros, en Islas, ó Tierra-firme de Europa, ó América, á ménos de verse obligado de accidentes de otra suerte no remediables: Por tanto quiero, que el Presidente de la Contratacion á Indias ó el Ministro encargado del despacho de Navios á aquellos Dominios, y el Intendente, ó Ministro de Marina del Puerto en que se equipare, concurran á facilitarle quanto fuere regular ó este fin, cada uno en la parte que le tocare: el primero en lo respectivo á su habilitacion y carga; y el de Marina en lo que mira á Tripulacion, que deberá componerse de gente matriculada, y constar que lo sea por lista certificada, que ha de entregarle, obligàndose á cuidar de su conserracion, y responder de sus faltas, segun previenen las Ordenanzas de Marina.

Y mando á los Officiales Generales, ó particulares Comandantes de mis Esquadras y Baxeles, al Presidente, y Ministros de la Contratacion á Indias, á los Comandantes, y Intendentes de los departamentos de Marina, Ministros de sus Provincias, Subdelegados, Capitanes de Puerto, y otros qualesquiera Oficiales, Ministros, y Dependientes de la Armada, á los Vireyes, Capitanes, ó Comandantes generales de Reynos y Provincias, á los Gobernadores, Corregidores y Justicias de los Pueblos de la Costa de Mar de mis dominios de Europa y América, á los Officiales Reales, ŏ Jueces de arribadas en ellos establecidos, y á todos los demas Vasallos mios, á quienes pertenece, ó pertenecer pudiere, no le pongan embarazo, causen molestia, ó detencion; ántes le auxîlien, y faciliten lo que hubiere menester para su regular navegacion, y legitimo comercio: Y á los Vassallos y Subditos de Reyes, Principes y Repùblicas amigas y aliadas mias á los comandantes, Gŏbernadores ó Cabos de sus Provincias, Plazas, Esquadras, y Baxeles, requiero, que asimismo no le impidan su libre navegacion, entrada, salida ó detencion en los Puertos, á los quales por algun accidente se conduxere; permitiéndole que en ellos se bastimente, y provea de todo lo que necesitare: A cuyo fin he mandado despachar este Pasaporte, refrendado de mi Secretario de Estado, y de la negociacion de Marina, el qual valdrá por el tiempo que durare su viage de ida y vuelta; y concluido que sea, le recogerá el Ministro que entendiere en su descarga: Y para su validacion y uso pondrá á continuacion la nota que corresponde, el que concurriere á su despacho. Dado en á de mil setecientos

Yo El Rey,

PEDRO VARELA.

Modelo del Pasaporte, o Patente de Mar que se concede a los Buques para navegar en Europa, citado en el Articulo XVII.

Don Carlos, por la Gracia de Dios, Rey de Castilla, de Leon, de Aragon, de las dos Sicilias, de Jerusalem, de Navarra, de Granada, de Toledo, de Valencia, de Galicia, de Mallorca, de Sevilla, de Cerdeña, de Cordoba, de Corcega de Murcia, de Jaen, de los Algarbes, de Algezira, de Gibraltar, de las Islas de Canarias, de las Indias Orientales y Occidentales, Islas y Tierra-firme del Mar Oceano; Archiduque de Austria; Duque de Borgoña, de Brabante y Milan; Conde de Abspurg, Flandes, Tirol, Barcelona, Señor de Vizcaya y de Molina, &c.

Por quarto he concedido permiso á vecino de para que con su nombrado de porte de toneladas pueda navegar, y comerciar en los Mares y Puertos de Europa, tanto de mis Dominios, como de Extrangeros; y singularmente en los con absoluta prohibicion de pasar á los de Islas, ó Tierra-firme de América: Por tanto quiero, que constando la pertenencia de la Embarcacion al referido ó a otro Vasallo mio de quien tenga poder, se le permita equiparla con gente de su misma Provincia, o de otra de mis Dominios, habil á este efecto, segun lo prevenido en las Ordenanzas de Marina, para salir á navegar, y comerciar en ella, baxo las reglas establecidas.

Y mando a los Officiales generales, o particulares comandantes de mis Esquadras y Baxeles; á los Comandantes y Intendentes de los Departementos de Marina: á los Ministros de sus Provincias, Subdelegados, Capitanes de Puerto, y otros qualesquier Oficiales y Ministros de mi Armada: á los Capitanes, ó Comandantes

Mr. Justice STORY. Without giving any opinion upon the sufficiency p. 99
of the evidence, to establish the | probability, that the forms of passport p. 100
now offered to the inspection of the Court were ever authoritatively |
annexed to the original treaty, in the possession of the Spanish Govern- p. 101
ment, the Court is of opinion, that the motion for a continuance must be denied. The passport found on board the Isabella, is materially variant, both in form and substance, from the forms of passport now produced; and to the form of the passport actually annexed to the treaty, and to no other, was the effect intended by the treaty, whatever that effect may be, meant to be attributed. The possession of that form, and not of any other passport which might be substituted for it, was of the very essence of the treaty. It is clear, therefore, that even if the case were as the claimant's counsel supposes, he could derive no benefit whatever from it, because the treaty passport was not on board; and the case must, therefore, in this respect, be judged by the rules of the Prize Court, independent of the conventional law.

Motion denied.

generales de Provincias: á los Gobernadores, Corregidores, Jueces y Justicias de los Puertos de mis Dominios, y a todos los demas Vasallos mios, á quienes pertenece, ó pertenecer pudiere, no le pongan embarazo, causen molestia, ó detencion alguna; ántes le auxilien, y faciliten lo que hubiere menester para su regular navegacion y legitimo comercio: Y á los Vasallos y Subditos de Reyes, Principes y Republicas amigas y aliadas mias: á los Comandantes, Gobernadores, ó Cabos de sus Provincias, Plazas, Esquadras y Baxeles, requiero, que asimismo no le pongan embarazo en su libre navegacion, entrada, salida, ó detencion en los Puertos, á los quales deliberadamente, ó par accidente se conduxere, y le permitan exercer en ellos su legitimo comercio, bastimentarse, y proveerse de lo necesario para continuarle; á cuyo fin he mandado despachar este Pasaporte, refrendado de mio Secretario de Estado, y de la Negociacion de Marina, el qual valdra, y tendrá fuerza por termino de contado desde el dia en que usare de él, segun conste por la Nota que á su continuacion se pusiere. Dado en á de de mil setecientos noventa

Yo El Rey,
PEDRO VARELA.

The Bello Corrunes.—The Spanish Consul, claimant.

(6 Wheaton, 152) 1821.

A foreign consul has a right to claim, or institute a proceeding, *in rem*, where the rights of property of his fellow-citizens are in question, without a special procuration from those for whose benefit he acts.

But a consul cannot receive actual restitution of the *res* in controversy, without a special authority from the particular individuals who are entitled.

A capture made by citizens of the United States of property belonging to subjects of a country in amity with the U.S. is unlawful, wheresoever the capturing vessel may have been equipped, or by whomsoever commissioned; and the property thus captured, if brought within the neutral limits of this country, will be restored to the original owners.

Whatever difficulty there may be, under our municipal institutions, in punishing as pirates, citizens of the U.S. who take from a State at war with Spain,
p. 153 a commission to cruise against that power, contrary | to the 14th article of the Spanish treaty, yet there is no doubt that such acts are to be considered as piratical acts for all civil purposes, and the offending parties cannot appear, and claim in our Courts the property thus taken.

It seems, that the terms, 'a *State* with which the said King shall be *at war*,' in the 14th article of the treaty, include the South American provinces which have revolted against Spain.

But, however this may be, the Neutrality Act of June, 1797, c. i. extends the same prohibition, with all its consequences, to a colony revolting, and making war against its parent country.

In the case of such an illegal capture, the property of the lawful owners cannot be forfeited, for a violation of the revenue laws of this country, by the captors or by persons who have rescued the property from their possession.

The rights of salvage may be forfeited by spoliation, smuggling, or other gross misconduct of the salvors.

APPEAL from the Circuit Court of Rhode Island.

This was the case of a Spanish vessel and cargo, stranded on Block Island, and there seized by the officers of the customs. An information on behalf of the United States, was filed in the District Court, against the property, as forfeited, for an alleged breach of the revenue laws. His Catholic Majesty's Vice Consul for the district of Rhode Island, interposed a claim on behalf of 'certain subjects of the King of Spain,' the original owners of the ship and cargo, which was bound on a voyage from the port of Tarragona, in Spain, to La Vera Cruz, and was taken off Cape St. Antonio, on the west end of the island of Cuba, on the 21st of March, 1818, by an armed vessel called the Puyerredon, commanded by one James Barnes, sailing under Buenos Ayres colours, and asserting a right to make captures under the authority of the government of that place. Restitution
p. 154 to the original Spanish owners was claimed, | upon the ground that the capturing vessel had been equipped in the ports of this country, in

violation of our neutrality. An allegation was also filed by Barnes, demanding restitution of the property to the captors, as having been taken, *jure belli*, on the high seas. Another claim was also filed by certain persons, part of the original crew of the Bello Corrunes, left on board after the capture, who asserted a claim for salvage, in case the property should be restored to the original Spanish owners, under the following circumstances. The master of the captured vessel, and all her crew except four, were taken out, and a prize master and crew put on board from the Puyerredon. Thus equipped, the Bello Corrunes cruised in company with the Puyerredon nearly two months, during which period another Spaniard, of the original crew of the Bello Corrunes, was returned to that vessel. The two vessels afterwards separated, and on the 8th of May, in lat. 32° 30′ north, and longitude 74° W. from London, the prize crew, assisted by the persons originally on board the Bello Corrunes, rose on the prize master and other officers, and rescued the vessel from their possession. They then steered their course for the United States, and the vessel was by some means stranded upon Block Island, where the vessel and cargo were seized by the revenue officers.

A decree was entered in the District Court, *pro forma*, and by consent of parties, restoring the property to the original Spanish owners as claimed, and dismissing the other allegations and claims. This decree was affirmed, *pro forma*, and by consent, in | the Circuit Court, and the p. 155
cause was brought by appeal to this Court.

It appeared by the evidence in the Courts below, and by the farther proof taken under a commission from this Court, that the capturing vessel was formerly owned by citizens of the United States, and called the *Mangoree*, and was originally armed, equipped, and manned at Baltimore ; and sailed from that port in March, 1817, under the command of Barnes, a citizen of the United States, domiciled in that city, under Buenos Ayres colours, on a cruize ; and after capturing several Spanish vessels, proceeded to Buenos Ayres, where the vessel arrived in August, 1817.[1] The vessel was then altered from a schooner into a brig, and her name changed to the *Puyerredon*, an addition of one gun was made to her armament, some of the original crew were reshipped, and other seamen recruited. An alleged sale of the vessel took place to one Higginbotham, a citizen of the United States domiciled at Buenos Ayres ; and a commission was issued by the Supreme Director of the United Provinces of South America, dated the 20th of November, 1817, authorizing Barnes to capture Spanish property ; with which the vessel sailed from Buenos Ayres on the cruise, during which the present capture was made.

[1] This was the same vessel which captured the *Divina Pastora*, in 1816. *Vide* 4 *Wheat.* p. 52.

February 8th.

The *Attorney-General*, for the United States, argued, that the officers
p. 156 of the Government being in | possession of this property, would hold it as a *droit* until some person appeared duly authorized to claim it. The consul of Spain has no authority to claim, in his own name, and in his official character, the property of persons to him unknown, and by whom he cannot therefore have been invested with a special procuration. He is not invested with a general authority for that purpose, *virtute officii*, nor is there evidence in this particular case that the consul is the agent, consignee, or correspondent of the owners, who are sometimes permitted to claim for their principal, when the latter is absent from the country.[1]
p. 157 Great public inconveniences and mischief, | might follow from allowing foreign consuls, not specially authorized by their own government, or by this, nor by the parties, to receive restitution of property, for which they may interpose a claim as belonging to their fellow subjects. Supposing the property here to be devested out of the original owners by the capture, and vested in the captors, *jure belli*, it must be forfeited to the United States for violating the revenue laws, which was the original intention of

[1] The Anne, 3 *Wheat. Rep.* 435. *De Steck, des Consuls*, 64. *Warden on Consuls*, 116, and opinion of M. PORTALIS there cited. This opinion of M. PORTALIS, in the case of the claim of the Danish Consul before the French Council of Prizes, will be found in 6 *Wheat.* APPENDIX, *Note* No. V.

The passage cited from *De Steck*, is as follows :

'§ 27. Selon la règle par la plûpart des traités de commerce et par l'usage presque généralement reçu les consuls sont les juges des gens de mer et des négocians et marchands de leur nation.*

28. Il leur est ordinairement attribuée la jurisdiction tant en matière civile que criminelle.

29. Cette jurisdiction attribuée aux consuls n'émane point de la puissance et de l'autorité du souverain, qui les établit, qui n'a point de pouvoir sur ses sujets expatriés, démeurans, commerçans, établis en des pays étrangers. Elle depend et derive plutôt de la concession, de l'attribution du souverain de l'état où les consuls résident. Elle suppose donc toujours des traités par lesquels elle est stipulée, accordée, attribuée.

30. Lorsque la jurisdiction est attribuée aux consuls par les traités de commerce, ils ont le pouvoir dans leur district, dans l'endroit de leur établissement et dans leur résidence, de juger les différens, contestations et procès qui surviennent entre les gens de mer, les négocians, les commerçans de leur nation, qui s'élevent entre les capitaines, patrons, l'équipage, et les passagers des vaisseaux et des batimens nationaux.

31. Leur jurisdiction ne se borne pas alors aux affaires contentienses des nationaux. Ils ont aussi la jurisdiction volontaire, c'est à dire la faculté de recevoir les déclarations des capitaines des vaisseaux, et tous les actes que leur nationaux veulent passer dans leur chancellerie, de les légaliser, de recevoir leur testamens, de régler leurs successions et leur tutelles, de faire l'inventaire de leur biens délaissés et naufragés, etc.

32. Dans les procès que surviennent entre les nationaux et les habitans et sujets de l'état où les consuls sont établis, ou entre les commerçans d'autres nations, ils assistent, protègent, défendent leurs nationaux. Dans les échelles du Levant les juges du lieu n'osent dans ce cas procéder sans la participation et l'intervention du consul, sans la présence des on interprète.' *De Steck, des Consuls*, p. 64.

* *Valin. Com. Sur l'Ordonn. de la Marine, l.* 1. *tit.* 9. *art.* 12. *p.* 251.

the parties, and was partially accomplished at Block Island. Or supposing the recapture by the prize crew to be valid, they must be | considered as p. 158
the agents of the original proprietors, and their misconduct must be visited upon the original proprietors.

Mr. *Winder*, for the appellants and captors, insisted, that the present capture being made on the high seas, *jure belli*, under a commission regularly issued by a Government acknowledged to be entitled to exercise the rights of war against its enemy, could not be inquired into by the Courts of this country ; but that the captors being entitled to the possession, having only been dispossessed by the criminal misconduct of the prize crew which they had put on board to secure the prize, were entitled to restitution, in order to enable them to proceed against it as prize in the competent Court. Whatever military means are directed, from within the territory of one of the belligerent States, against its enemy, are not subject to the review or control of any neutral or other foreign tribunal or authority, except in the single case of a direct violation of the neutral territory itself. This principle grows out of the perfect independence and equality of nations, existing as it were in a state of nature in respect to each other. Their conduct in authorizing acts of war is no more reviewable by other nations, than any other their acts of sovereignty.[1] It is this perfect independence and equality of sovereign States which is the sole foundation of the exclusive jurisdiction of the Prize Courts of the captor's country over every thing done under a prize | commission.[2] In the cele- p. 159
brated case of the *Exchange*,[3] this Court held, that the commission of a sovereign protected that vessel from all inquiry, notwithstanding the flagrantly unjust conduct of the French Emperor in appropriating the property of an American citizen to his own use, without the form of a trial, and incorporating it into his military marine. It must be shown, that the act of the Government of Buenos Ayres in granting this commission is unlawful before it can be shown that any of the effects of that act are invalid. Suppose the *Exchange*, on her voyage, had made a capture, could this Court have restored it to the former owners ? Or could it inquire into the validity of such a capture consistently with the principles laid down in that case ? The enlistment of men in neutral countries to serve the belligerent powers is lawful, unless there be some express prohibition of the neutral State. Such a municipal prohibition would certainly make it unlawful, in respect to the neutral State whose laws are violated ; but it does not, therefore, follow, that all the acts of such persons in war would be unlawful, or that they are not entitled to the rights of lawful war.[4] The carrying of contraband is prohibited by the

[1] *Vattel, Droit des Gens, Prelim. s.* 15–23. *l.* 2. *c.* 4. *s.* 54, 55.
[2] L'Invincible, 1 *Wheat. Rep.* 238. 254. [3] 7 *Cranch*, 116.
[4] *Vattel, l.* 3. *c.* 2. *s.* 13–15. *Bynk. Q. J. Pub. pp.* 175. 177. of Du Ponceau's translation.

law of nations under the penalty of confiscation, and the exportation of contraband articles may be prohibited by the municipal code under
p. 160 other penalties; but such prohibition would not invalidate a | capture made with the munitions of war thus exported. The Government of this country naturalizes all foreigners indiscriminately, in peace and in war, and employs them in its land and naval service; and it is not for us to question the right of a citizen of the United States to enter into the military service of a foreign State. It is insisted, that not only the Court has no authority by the law of nations to restore to the original owners a prize thus captured, but that the law of nations gives the Congress no power to authorize the Court to restore. The Legislature may prohibit our citizens from enlisting in the service of the belligerents, or from fitting out ships to be employed in cruising, under ever so severe penalties; but those penalties cannot extend to a forfeiture of the rights of prize acquired under the commission of an independent sovereign State. Nor are Spain and the United States competent to regulate by their mutual treaty stipulations the sovereign rights of the South American Provinces, though they may stipulate to inflict penalties *in personam*, for what they deem the criminal conduct of their subjects or citizens. As to the claim of the United States for a forfeiture on account of the alleged violation of the revenue laws, it is already settled by this Court, that the property of foreigners cannot be forfeited for the misconduct of those who are tortiously in possession, as was the case here with the rescuers.[1] |

p. 161 Mr. *Webster* and Mr. *Wheaton*, for the respondent and claimant, the Spanish Consul, (1.) contended, that the Consul, from the necessity of the case, had a right to interpose a claim for the property of his fellow subjects, brought into our ports in this manner. He does not claim as attorney in fact, but his character is more like an attorney at law. There is no necessity of a special procuration from those for whom he claims, because it does not follow, that the property will be actually delivered into his hands until the respective rights of the owners are determined, and a special authority produced from them to receive distribution. There is the more necessity for permitting the Consul, as the official protector of the commercial rights and interests of his fellow subjects in a foreign country, to interpose a claim in a case of this nature, because the usual term of a year and a day allowed in prize causes, where there is no claim, would not be allowed here, since the property is demanded by the captors under their pretended commission, and if the subjects of Spain, residing at a distance, and ignorant even of the fact of the capture, were not allowed to be represented by their Consul, the property would be taken away by the captors, and irrecoverably lost to the

[1] The Josefa Segunda, 5 *Wheat. Rep.* 338.

original owners. It will also frequently be impossible for the Consul to specify the owners for whom he claims, and he ought, therefore, to be allowed to file allegations claiming it for Spanish subjects generally. The opinion of M. PORTALIS in the case of the Danish Consul,[1] proceeds entirely upon the peculiar | regulation of France, which makes the p. 162
Procureur General, the official attorney of all persons who are not represented before the tribunals by any special procuration; which would, of course, render unnecessary the interposition of foreign Consuls in cases where the rights of their countrymen were involved.

2. They argued, that the vessel by which the present capture was made, having been fitted out in the ports of the United States, and the capture having been made by our citizens, in violation of the law of nations, the acts of Congress, and the treaty with Spain, the property must be restored to the original owners, according to the uniform decisions of this Court.[2] Under our municipal constitution, the treaty is the supreme law of the land; and it would be so by the law of nations without that constitutional provision. 'Every treaty,' says Sir W. Scott, 'is a part of the private law of the country which has entered into that treaty, and is as binding on the subjects as any part of their municipal laws.'[3] The 9th article of the Spanish treaty declares, that goods taken *from pirates* shall be restored to the lawful owners; and the 14th article declares the captors, in the present case, *to be pirates*, as it provides, that they shall be punished as such for taking a commission to cruise against Spain. And yet we are inquiring whether they are entitled to have restitution | of the very property which they have thus p. 163
piratically taken. It may be admitted, that in some cases citizens of one country may lawfully engage in the wars of another; we may take the doctrine cited from Bynkershoeck, that they may enlist where there is no prohibition. It may also safely be admitted, that as far as the other belligerents are concerned in their hostile relations with each other, it is lawful war. Spain cannot justly complain of the South American Provinces for employing foreigners in their service. And if the capturing ship were a national vessel, like the *Exchange*,[4] no doubt her commission would estop all judicial inquiry into her conduct. But this is a private claim. The original Spanish owners claim nothing against the Government of Buenos Ayres. That Government claims nothing of the Spanish owners. Our own citizens assert a claim to this property acquired in war, which can only be maintained upon the supposition, that they may be at war whilst their country is at peace; that they are not bound

[1] Vide 6 *Wheat.* APPENDIX, *Note* No. V.
[2] The Alerta, 9 *Cranch*, 359. Talbot v. Jansen, 3 *Dall.* 133. L'Invincible, 1 *Wheat. Rep.* 238. The Divina Pastora, 4 *Wheat. Rep.* 52. Note to that case, *p.* 62. Sir L. Jenkins' works, there cited. The Estrella, 4 *Wheat. Rep.* 298.
[3] The Eenrom, 2 *Rob.* 6. [4] 7 *Cranch*, 116.

by the laws and treaties of their own country; that they may expatriate themselves, *flagrante bello*, for the purpose of committing hostilities against nations in amity with the United States. If the doctrine contended for on the part of the captors, that the commission is conclusive, be correct, then the Court can never look behind it, and the belligerents may dispense with our laws, and the allegiance of our citizens, at their pleasure. The case of *Talbot* v. *Janson*,[1] whatever may
p. 164 be thought | of it in other respects, has never been overruled as to the principle, that the neutral tribunals have a right to inquire into the validity of a captor's commission, to see whether it was obtained and used in violation of the laws of the neutral country. That case has been made the basis of a series of decisions, which have become the settled law of this Court, and which it is now too late to question. The Court has uniformly treated it as a necessary consequence of the personal illegality of the act of taking the commission that the property captured under it should be restored to the lawful owner. It is, therefore, immaterial where, or by whom, the capturing vessel was equipped. It is sufficient, that the capturing persons are citizens of the United States, and cannot assert a right of property founded on their own illegal conduct.

3. But even admitting that the original capture was legal, the prize cannot now be reclaimed by the captors. An interest acquired in war by possession, is lost with the possession. The rights of capture are completely devested by recapture, escape, or rescue.[2] Here the property has been devested out of the possession of the captors by the rescuers, for the benefit of the original owners, and the rescuers hold it in trust for their benefit.

p. 165 Mr. *Wheaton*, for the salvors, stated, that the original | owners being thus shown to be entitled to restitution, the next question would be, whether the salvors were entitled to any, and what salvage. Unless the property were thus restored to the Spanish owners, the rescuers could not claim any salvage; for certainly the captors would not admit that any meritorious service had been rendered them by the rescue. But, as against the former owners, the rescuers have a just claim, having saved the property from the grasp of their enemy: and it would be idle to send the salvors to the Courts of Spain, to prosecute their claim, since the possession of the property enables this Court to do complete justice between all the parties.[3] And this Court has already determined, that in a case of derelict by one belligerent, a neutral is entitled to salvage, and the Courts of the neutral country into which the property is brought, have authority to award it.[4] As to the *quantum* of salvage:

[1] 3 *Dall.* 133.
[2] The Astrea, 1 *Wheat. Rep.* 125. The Invincible, 2 *Gallis.* 35. Hudson v. Guestier, 4 *Cranch*, 293. S. C. 6 *Cranch*, 281. The Diligentia, 1 *Dodson*, 404.
[3] The Two Friends, 1 *Rob.* 281. [4] The Mary Ford, 3 *Dall.* 198.

one third was allowed in that case ; and it was doubted whether more ought not to have been allowed, if the salvors had appealed. The case of the *Adventure*,[1] which was a donation at sea by the belligerent captor to a neutral, who brought the property into a port of his own country, was held to be a lawful salvage, and a moiety was allowed. In the case of *Rowe et al.* v. *the Brig* ——, which was a Spanish vessel captured by a South American cruiser, one of the learned judges of this | Court allowed p. 166
a moiety of the net value.[2] And in general, it may be affirmed that there is no inflexible rule, either in cases of derelict, or of rescue ; a reasonable salvage, proportioned to the meritorious exertions of the salvors, is to be decreed ; but never less than a third, unless the property is very valuable, or the services rendered very inconsiderable.[3]

Mr. *Webster*, contra, upon the claim for salvage, insisted, that it appeared by the evidence that there had been a partial embezzlement of the property by the alleged salvors, and that it was a fixed rule that such misconduct, or any circumstance of fraud, forfeited the rights of salvage.[4]

February 26th.

Mr. Justice JOHNSON delivered the opinion of the Court.

This vessel was stranded on Block Island, in an alleged effort to reach a port of the United States. The vessel and cargo have been seized by the Collector of Newport, for supposed violations of the trade laws of this country, and an information was accordingly filed, to subject the whole to condemnation, in the District Court, for Rhode Island District.

This claim of the United States has been opposed by three classes of competitors. The vessel and | cargo, it appears, are Spanish property, p. 167
and were captured on the south western coast of Cuba, by the Puyerredon, a private armed brig, bearing the flag of the Buenos Ayrean Republic, and commanded by Captain James Barnes. Being armed, and well calculated for a privateer, she was manned with a complement of the privateer's men, about thirty in number, and her original commander, and all except four of the Spanish crew, removed. Thus equipped, it appears that she cruised, as a tender to the Puyerredon, for about two months, during which time another Spaniard was added to her crew, and on the 8th May, when in lat. 32 30, N. and long. 74, from London, the crew rose upon the officers, subdued them, put them on board the first vessel they met with, and steered their course for this continent.

Thus circumstanced, Capt. Barnes has libelled in behalf of the

[1] 8 *Cranch*, 221. [2] 1 *Mason's Rep.* 372.
[3] *Abbott on Shipp.* 451. *Story's Ed. Note* (1.) The Favourite, 4 *Cranch*, 347, The Jonge Bastiann, 5 *Rob.* 322. The Lord Nelson, *Edw.* 79. L'Esperance, 1 *Dodson.* 49. The Blendenhall, 1 *Dodson*, 421. Barrels of Flour v. Prior, 1 *Gallis.* 133.
[4] The Blaireau, 2 *Cranch*, 240.

captors, the Spanish Vice Consul in behalf of the original Spanish owners, and the crew of the Bello Corrunes have libelled for a compensation by way of salvage, to which they suppose themselves entitled, in the event of restitution being decreed to the original owners.

To these several claims it is objected on behalf of the United States, that restitution cannot be decreed to the Spanish Vice Consul, because he is not in that capacity a competent party in Court to assert the rights of individual subjects; nor, in favour of the captors, because the privateer was originally fitted out in the United States, and is still owned
p. 168 by American citizens; nor, in favour of the salvors, because | they have forfeited their claim to salvage by spoliation, and an attempt to smuggle.

As these suggestions open the whole case, it shall be disposed of by considering them severally in their order, only remarking *en passant*, that though they were all sustained, it would avail the United States nothing; since, without evidence sufficient to sustain the criminal charge, it would only follow that the proceeds of the property libelled, must lie in the registry of the Court, until a proper claimant shall make his appearance.

On the first point made by the Attorney General, this Court feels no difficulty in deciding, that a Vice Consul duly recognised by our Government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any Court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which Consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in Courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the Courts of the United States, has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it. Whether the powers of the Vice Consul shall in any
p. 169 instance extend to the right to receive in his national character, | the proceeds of property libelled and transferred into the registry of a Court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognised. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed. And this view of the subject will be found to reconcile the difficulties supposed to have been presented by the authorities quoted on this point. Considering, then, the original Spanish interest as legally represented, the questions are, whether that interest is not forfeited to the United States, or superseded by the superior claims of the capturing vessel.

This is not the ordinary case of a capture made under the taint of an illegal outfit. The decision of this Court must rest upon a very different principle. In those cases, the national character of the claimant is immaterial. He has violated the neutrality of this country, and cannot shelter himself under his commission, or his allegiance, however unquestionable his right, individual or national, would have been otherwise. But can a citizen of this country, who has violated its laws, ever be recognised in our Courts as a legal claimant of the fruits of his own wrong? We are of opinion he cannot, and it therefore becomes material to determine what is the national character of the claimants, under the capture made by the Puyerredon.

At the time of this vessel's first sailing from Baltimore, she was unquestionably American owned and commanded. During the time of her cruising | under the name of the Mangoree, it is not pretended that p. 170
she changed owners. The legality of her conduct at that period has been defended altogether on the ground of her taking the flag of Buenos Ayres, being commissioned in a foreign state, and her commander, Barnes, assuming the character of a citizen of the power that had commissioned him. It is not until her arrival at Buenos Ayres, in 1817, that any change of property in the vessel has been set up in proof. At that time, it is contended, she was set up at auction, and changed owners, passing into the hands of a Mr. Higginbotham, a citizen of the United States, married and domiciled at Buenos Ayres.

If this fact had been satisfactorily made out in evidence, it would have drawn this Court into the consideration of some questions of great nicety, which have never yet received a solemn adjudication in this Court. But the evidence to support this pretended change of property is so wholly unsatisfactory, that the Court rejects it; for, the ordinary solemnities of such transfers are too well known, to admit the belief that in this instance, the change of property, had it been real, would not have been effected or commemorated by written documents.

This Court, then, proceeds upon the assumption that the Puyerredon is still, in reality, American owned, and they are also of opinion, that she must be held to be American commanded; since, even if the doctrine could be admitted, that a man's allegiance may be put off with his coat, it is very clear that Mr. Barnes' citizenship is altogether in fraud of
the laws of his own country. His family has never | been removed from p. 171
Baltimore, and his home has been always either there, or upon the ocean.

The question then is, whether thus circumstanced, the claim in behalf of the owners and mariners of the Puyerredon, can be sustained.

We are decidedly of opinion it cannot.

By the 2d section of the 14th article of the treaty with Spain, 'Citizens, subjects or inhabitants' of the United States, are strictly prohibited

from taking ' any commission or letter of marque, for arming any ship or vessel, to act as privateers against the subjects of his Catholic Majesty, or the property of any of them, from any Prince or State with which the said King shall be at war.' And it is further provided, ' that if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate.'

Whatever difficulties there may exist under the free institutions of this country, in giving full efficacy to the provisions of this treaty, by punishing such aggressions as acts of piracy, it is not to be questioned that they are prohibited acts, and intended to be stamped with the character of piracy ; and to permit the persons engaged in the open prosecution of such a course of conduct, to appear, and claim of this Court, the prizes they have seized, would be to countenance a palpable infraction of a rule of conduct, declared to be the supreme law of the land.

Some doubts have been suggested on the use of the words ' *State at war* ' with Spain. This Court would not readily lean to favour
p. 172 a restricted construction | of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract, as well as a law : but it is not necessary to examine the grounds of these doubts, as applied to the present case ; because this treaty has been enforced by the provisions of the act of Congress of the 14th June, 1797, so as to leave no doubt of its extension to the case of cruising against Spain, under a commission from the new states formed in her colonies.

Citizens of the United States, therefore, present themselves to this Court to demand restitution of a prize which they had made in violation of the most solemn stipulations of a treaty, and provisions of a law of their own country, and of which they have been dispossessed by their own associates in guilt. Under such circumstances, this Court cannot hesitate to reject the claim, and adjudge the property to the original proprietors.

This view of the subject obviates the necessity of examining the reality and effect of the alleged rescue on behalf of the original owners, with a view to the question of restitution ; but it still becomes necessary, with a view to the question of forfeiture, and the merit of the alleged salvors. With regard to the former, it is very clear, that supposing the rescue to have been real and compleat, the Spanish consul ought not to be precluded from his election, whether to put his claim upon the ground, that the interest of those whom he represents was never legally devested, or that it was afterwards legally recovered. In the one case, there is no
p. 173 ground for | affecting it with the forfeiture, because of the conduct of the crew ; and in the other, some question may be made, how far the property was affected by the illegal acts of those who, at that time, held in the right of the owners. But even in this latter view of the state of

the property, we are of opinion, that the forfeiture was not incurred; since, although it be supposed, that the property was in custody of those who held for the Spanish owners, it was not held by those to whom the Spanish owners had entrusted the vessel and cargo. And this is the only ground upon which the acts of the ship's company are made to produce forfeitures of the interest of shippers or ship owners. For, besides the considerations drawn from the great predominance of the force detached from the privateer, in the effort to recapture, the few men of her own crew, were gratuitous actors. Their contract with the owners had ceased, and they assumed the character of voluntary agents, whose conduct the owners might or might not adopt, according to their own views or interests.

As to the claims of the salvors, it may be remarked, that maritime Courts always approach them with great benignity and favour. Yet, in proportion to the inclination to favour where there is merit, is the indignation with which they view every indication of a disposition to take advantage of the unfortunate. Spoliation, and even gross neglect, may forfeit all the pretensions of salvors to compensation.

In the case before us, it is not too much to pronounce the claim of those of the crew of the Puyerredon | who libel for salvage, to be not p. 174
only groundless but impudent; for, besides spoliation, smuggling, and the grossest irregularities, it is perfectly clear, from the pilot's evidence, that they run the vessel on shore purposely. So, that whatever may have been the reality of their benevolent designs towards the Spanish owners originally, their subsequent conduct not only casts a doubt over their candour, but devests them of all pretensions to compensation.

Nor do the five Spaniards who composed a part of the crew of the Bello Corrunes, at the time she was stranded, and who were not of the capturing crew, escape being involved in the suspicions which fasten on their associates.

It is a melancholy truth, too well known to this Court, that the instruments used in the predatory voyages carried on under the colours of the South American States, are among the most abandoned and profligate of men. Under the influence of strong interests or fears, the mind of man too often yields, even where the moral sense still exerts its influence; but hold out to one of these practised adventurers in a course of plunder, the hope of gain on the one hand, and the fear of imprisonment for piracy on the other, and what are the chances for truth!

That these men were selected from the Spanish crew to associate with those of the capturing vessel, is a circumstance not very favourable to their characters and conduct, and it would require some strong evidence of their innocence to remove from them the suspicion of a voluntary association with the enemies of their King. Joining in, or even setting on |

p. 175 foot or promoting the recapture, (facts which rest wholly on their own veracity,) can prove very little in their favour, since such mutinies are become everyday occurrences whenever such a crew find themselves in possession of a valuable cargo. Nor will the inference in their favour be very strong from their resorting to the Consul of their country, since it was the only course which held out a chance of gain, or of escape from the imputation both of piracy and smuggling. There is no evidence to separate their conduct from a compleat identification with the rest of the crew, except what is obtained from their own testimony. Yet it is suggested, that they may still make their innocence and merits to appear; and as the parties have signified their consent that the case may be opened in the Court below as to this class of salvors, the case will be remanded to the Circuit Court, for further proceedings, so far as the claim for salvage is concerned.

Decree accordingly.

DECREE. This cause came on to be heard on the transcript of the record of the Circuit Court for the District of Rhode Island, and was argued by counsel: on consideration whereof, it is ORDERED and DECREED, that the Decree of the said Circuit Court in this case be, and the same is hereby affirmed, with costs, against Barnes and others, except so far as relates to the libel for salvage of Emanuel Rodriguez, Emanuel Josef,
p. 176 Emanuel Barbarus, Antonio | Josef, and Josef Isnages, who formed no part of the crew of the private armed brig Puyerredon; and as to so much of the said Decree as relates to the said libellants Emanuel Rodrigues and others, it is further DECREED and ORDERED, by consent of parties, by their counsel, that the Decree of the said Circuit Court be, and the same is hereby reversed and annulled. And it is further ORDERED, that the said cause be remanded to the said Circuit Court for farther inquiry. And that the proceeds of the said Bello Corrunes and cargo lie in the Registry of the said Circuit Court, to be paid over, under the order of that Court, to the Spanish owners, as interest shall be made to appear.

The Nueva Anna and the Liebre.—The Spanish Consul, claimant.

(6 Wheaton, 193) 1821.

This Court does not recognise the existence of any lawful Court of Prize at Galveztown, nor of any Mexican republic or state, with power to authorize captures in war.

APPEAL from the District Court of Louisiana.

These were the cases of the cargoes of two Spanish ships, captured and condemned by a pretended Court of Admiralty at Galveztown,

constituted by Commodore Aury, under the alleged authority of the Mexican republic. The goods were, after this condemnation, brought into the port of New-Orleans, and there libelled by the original Spanish owners in the District Court. That Court decreed restitution to the original owners, and the captors appealed to this Court.

February 27th.

This cause was argued by *Mr. Hopkinson* for the respondents and libellants, no counsel appearing for the appellant and captors.

The COURT stated, that it did not recognise the existence of any Court of Admiralty sitting at Galveztown, with authority to adjudicate on captures, nor had the Government of the United States hitherto acknowledged the existence of any Mexican republic or state at war with Spain ; so that the Court could not consider as legal, any acts done under the | flag and commission of such republic or state. But, as the p. 194
record, in this case, stated the capture to have been made under the flag of Buenos Ayres, it became necessary to send back the case, in order to ascertain under what authority it was in fact made.

Sentence reversed, and cause remanded for further proceedings.

La Conception.—The Spanish Consul, claimant.

(6 Wheaton, 235) 1821.

Where a capture is made of the property of the subjects of a nation in amity with the United States, by a vessel built, armed, equipped, and owned in the United States, such capture is illegal, and the property, if brought within our territorial limits, will be restored to the original owners.

Where a transfer of the capturing vessel in the ports of the belligerent State, under whose flag and commission she sails on a cruize, is set up in order to legalize the capture, the *bona fides* of the sale must be proved by the usual documentary evidence, in a satisfactory manner.

APPEAL from the Circuit Court of South Carolina.

This was an allegation filed in the District Court of South Carolina by the Vice Consul of his Catholic Majesty, claiming restitution of the ship La Conception and cargo, as the property of Spanish subjects to him unknown, which had been illegally captured by the armed ship La Union, sailing under the flag of Buenos Ayres, and pretending to have a commission or letter of marque from that government, but actually built, equipped, armed, and manned in the United States. A claim was interposed | by one Brown, claiming the property as having been taken p. 236
by him, as commander of La Union, on the high seas, under a commission from the government of Buenos Ayres, authorizing him to capture the property of the subjects of Spain. The District and Circuit Courts

decreed restitution of the property to the captors, no sufficient evidence being produced of the capturing vessel having been equipped, or having augmented her force in the ports of the United States. On appeal to this Court, farther proof was taken, showing conclusively, that the capturing vessel was originally built, owned, and equipped in this country, and after proceeding to Buenos Ayres, and sailing from that port on a cruize, had touched at the port of New-Orleans, and there illegally augmented her force, since which, the capture in question was made. This evidence was attempted to be repelled on the part of the captors, by testimony tending to show a transfer of the capturing vessel at Buenos Ayres to domiciled subjects of that country, and that the subsequent augmentation of her force at New-Orleans, if any, was very trifling, and only amounted to a replacement of her former equipment.

March 8th.

The *Attorney-General*, and Mr. *Hopkinson*, for the appellant and claimant, the Spanish Consul, argued, that the original owners were entitled to restitution, according to the uniform series of decisions in this Court, upon the ground that the capturing ship was built and equipped in the United States, with the intention of cruizing against the subjects of Spain, in violation of our neutrality, and actually belonged |
p. 237 to citizens of the United States, when the present capture was made; or had illegally augmented her force in our ports, previous to the capture.[1] That the pretended transfer at Buenos Ayres was evidently colourable, and was not proved by the production of the bill of sale, or any of the other documentary evidence usually expected by maritime Courts, to establish a change of this species of property. That the enlistment of additional seamen to the crew at New-Orleans, being proved, the *onus* was thrown back upon the captors, to show that the persons so enlisted were subjects of Buenos Ayres, transiently within the United States.[2]

Mr. *Winder*, contra, insisted, that it must be a clear case of the violation of our neutral rights, or the Court would not interfere to restore a capture made under a commission from a sovereign state, and that the *onus probandi* for this purpose was on the Spanish claimant.[3] We have an unquestionable right to build ships for sale, and to export any kind of contraband subject to the risk of capture: And even if a ship be expressly built for war, it may be sold to a belligerent, and afterwards equipped in his own ports to cruise against his enemy.[4] Here the pur-
p. 238 chaser | was actually domiciled at Buenos Ayres, and there is nothing

[1] The Alerta, 9 *Cranch*, 359. The Divina Pastora, 4 *Wheat. Rep.* 52. The Estrella, 4 *Wheat. Rep.* 298. La Amistad de Rues, 5 *Wheat. Rep.* 385. The Bello Corrunes, 6 *Wheat. Rep.* 152.

[2] The Estrella, 4 *Wheat. Rep.* 298.

[3] La Amistad de Rues, 5 *Wheat. Rep.* 385.

[4] The Alfred, 3 *Dall.* 387.

to impeach the *bona fides* of the transaction. He then sailed again from Buenos Ayres on a cruize, and the alleged augmentation of the crew at New-Orleans was, in effect, nothing but a replacement of the original force, the vessel having lost by desertion nearly the same number of men which she acquired by enlistment. Such a replacement, this Court has already determined not to afford a ground for restitution.[1] It is true, that the case cited was under the French treaty of 1778. But the 19th article of that treaty provides nothing more than a right of asylum and hospitality, the same as is enjoyed by the South American cruizers in our ports, under the President's instructions.

The counsel on both sides also argued on the same grounds which are stated in the case of the *Bello Corrunes*, 6 *Wheat. p.* 155, and which it is not thought necessary to repeat.

Mr. Justice STORY delivered the opinion of the Court.

In this case, if the cause had stood solely upon the evidence before the Circuit Court, we should have no difficulty in affirming its decision. But upon the new proofs which have been since taken, and are now produced to this Court, it is apparent that the capturing vessel was originally built, equipped, manned, and armed in the United States for a cruize, being owned by citizens of this country, and | sailed with the p. 239
intent of cruizing against Spain. It is true that she went to Buenos Ayres, and sailed under the colours of that government on a second cruize, during which this capture was made; but, there is no satisfactory evidence that the American ownership ever ceased, or that there was a real, *bona fide* sale at Buenos Ayres. If such a sale had really taken place, it was perfectly in the power of the captors to have proved it, in the clearest manner. A bill of sale is the customary and universal document by which the ownership of vessels is evidenced; and the want of any document of this nature, or of any direct and positive evidence of an actual sale, leaves no doubt in the mind of the Court, that no such sale ever was made. The consequence is, that the capturing vessel must still be considered, as owned in the United States; and, according to the decisions which have already been made, the capture was illegal, and the property must be restored to the original Spanish owners.

Sentence reversed.

[1] Moodie v. the Phœbe Ann, 3 *Dall.* 319.

The Santissima Trinidad and the St. Andre.

(7 Wheaton, 283) 1822.

The commission of a public ship of a foreign state, signed by the proper authorities, is conclusive evidence of her national character.

During the existence of the civil war between Spain and her Colonies, and previous to the acknowledgment of the independence of the latter by the United States, the colonies were deemed by us belligerent nations, and entitled, so far as concerns us, to all the sovereign rights of war, against their enemy.

How far, and under what circumstances, the evidence of witnesses, who concur in proof of a material fact, but whose testimony is in other respects contradictory, ought to be credited in respect to that fact.

The sending of armed vessels, or of munitions of war, from a neutral country to a belligerent port, for sale as articles of commerce, is unlawful only as it subjects the property to confiscation on capture by the other belligerent.

No neutral state is bound to prohibit the exportation of contraband articles, and the United States have not prohibited it.

In the case of an illegal augmentation of the force of a belligerent cruizer in our ports by enlisting men, the *onus probandi* is thrown on him to show, that the persons enlisted were subjects of the belligerent state, or belonging to its service, and then transiently within the U.S.

The 6th article of the Spanish treaty of 1795, applies exclusively to the protection
p. 284 and defence of Spanish ships within our territorial jurisdiction, | and provides only for their restitution, when captured within the same.

The 4th article of the same treaty, which prohibits the citizens or subjects of the respective contracting parties from taking commissions, &c. to cruize against the other under the penalty of being considered as pirates, is confined to private armed vessels, and does not extend to public ships.

Quere, Whether a citizen of the United States, independently of any legislative act on the subject, can throw off his allegiance to his native country ?

However this may be, it can never be done without a *bona fide* change of domicil, nor for fraudulent purposes, nor to justify the commission of a crime against the country, or any violation of its laws.

An augmentation of force, or illegal outfit, does not affect any capture made after the original cruize, for which such augmentation or outfit was made, is terminated.

But as to captures made during the same cruize, the uniform doctrine of this Court has been, that they are infected with the character of torts, and that the original owner is entitled to restitution, when the property is brought into our jurisdiction.

This doctrine extends to captures by public, as well as private armed ships.

Case of the *Cassius*, 3 *Dall. Rep.* 121. commented on, and confirmed.

Case of the *Exchange*, 7 *Cranch*, 116. distinguished from the present case.

The exemption of foreign public ships, coming into our waters, under an express or implied license, from the local jurisdiction, does not extend to their prize ships or goods, captured in violation of our neutrality.

APPEAL from the Circuit Court of Virginia.

This was a libel filed by the consul of Spain, in the District Court of Virginia, in April, 1817, against eighty nine bales of cochineal, two bales of jalap, and one box of vanilla, originally constituting part of the cargoes of the Spanish ships Santissima Trinidad and St. Ander,

and alleged, to be unlawfully and piratically taken out of those vessels on the high seas by a squadron consisting of two armed vessels called | the Independencia del Sud and the Altravida, and manned and com- p. 285
manded by persons assuming themselves to be citizens of the United Provinces of the Rio de la Plata. The libel was filed, in behalf of the original Spanish owners, by Don Pablo Chacon, consul of his Catholic Majesty for the port of Norfolk ; and as amended, it insisted upon restitution principally for three reasons : (1.) That the commanders of the capturing vessels, the Independencia and the Altravida, were native citizens of the United States, and were prohibited by our treaty with Spain of 1795, from taking commissions to cruize against that power. (2.) That the said capturing vessels were owned in the United States, and were originally equipped, fitted out, armed and manned in the United States, contrary to law. (3.) That their force and armament had been illegally augmented within the United States.

A claim and answer was given in by James Chaytor, styling himself Don Diego Chaytor, in which he asserted that he was commander of the Independencia, that she was a public armed vessel belonging to the government of the United Provinces of Rio de la Plata, and that he was duly commissioned as her commander ; that open war existed between those Provinces and Spain ; that the property in question was captured by him, as prize of war, on the high seas, and taken out of the Spanish ships the Santissima Trinidad and the St. Ander, and put on board of the Independencia ; and that he, afterwards, in March, 1817, came into the port of Norfolk with his capturing ship, where she was received | and acknowledged as a public ship of war, and the captured property, p. 286
with the approbation and consent of the government of the United States, was there landed for safe keeping in the custom house store. The claimant admitted that he was a native citizen of the United States, and that his wife and family have constantly resided at Baltimore ; but alleged, that in May, 1816, at the city of Buenos Ayres, he accepted a commission under the government of the United Provinces, and then and there expatriated himself by the only means in his power, viz. a formal notification of the fact to the United States consul at that place. He denied that the capturing vessel, the Independencia, was owned in the United States, or that she was fitted out, equipped, or armed, or her force augmented, in the ports of the United States, contrary to law. He denied, also, that the Altravida was owned in the United States, or that she was armed, equipped, or fitted out in the United States, contrary to law ; or that she aided in the capture of the property in question. He further asserted, that the captured property had been libelled and duly condemned as prize in the tribunal of prizes of the United Provinces, at Buenos Ayres, on the 6th of February, 1818. He

denied the illegal enlistment of his crew in the United States; but admitted that several persons there entered themselves on board as seamen in December, 1816, representing themselves to be, and being, as he supposed, citizens of the United Provinces, or in their service, and then transiently in the United States; and that he refused to
p. 287 receive citizens of this country, and | actually sent on shore some who had clandestinely introduced themselves on board.

It appeared by the evidence in the cause, that the capturing vessel, the Independencia, was originally built and equipped in the port of Baltimore as a privateer, during the late war between the United States and Great Britain, and was then rigged as a schooner, and called the Mammoth, and was fitted out to cruize against the enemy. After the peace she was converted into a brig, and sold by her original owners. In January, 1816, she was loaded with a cargo of munitions of war, by her new owners, who were also inhabitants of Baltimore, and being armed with twelve guns, constituting part of her original armament, she was sent from that port under the command of the claimant, Chaytor, ostensibly on a voyage to the northwest coast of America, but in reality to Buenos Ayres. By the written instructions given to the supercargo on this voyage, he was authorized, by the owners, to sell the vessel to the government of Buenos Ayres if he could obtain a suitable price. She arrived at Buenos Ayres, having committed no act of hostility, but sailing under the protection of the United States flag during the outward voyage. At Buenos Ayres the vessel was sold to the claimant, and two other persons; and, soon afterwards, in May, 1816, assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres, and the claimant made known these facts to the crew, asserting that he had become a citizen
p. 288 of Buenos Ayres, and had received | a commission to command the vessel as a national ship; and invited the crew to enlist in the same service; and the greater part of them, accordingly, enlisted. From this period, the public agents of the government of the United States, and other foreign governments at that port considered the vessel as a public ship of war, and this was her avowed character and reputation. No bill of sale to the government of Buenos Ayres was produced, but the claimant's commission from that government was given in evidence.

Upon the point of the illegal equipment and augmentation of force of the capturing vessels in the ports of the United States, different witnesses were examined on the part of the libellant, whose testimony was extremely contradictory; but it appeared from the evidence, and was admitted by the claimant, that after the sale at Buenos Ayres, in May, 1816, the Independencia departed from that port under his command, on a cruize against Spain; and after visiting the coast of Spain,

put into Baltimore early in the month of October of the same year, having then on board the greater part of her original crew, among which were many citizens of the United States. On her arrival at Baltimore she was received as a public ship, and underwent considerable repairs in that port. Her bottom was new coppered, some parts of her hull were recaulked, part of her water ways replaced, a new head was put on, some new sails and rigging to a small amount, and a new mainyard were obtained; some bolts were driven into the hull, and the mainmast (which had been | shivered by lightning) was taken out, reduced in length, p. 289
and replaced in its former station. For the purpose of making these repairs, her guns, ammunition, and cargo, were discharged under the inspection of an officer of the customs; and when the repairs were made, the armament was replaced, and a report made by the proper officer to the collector, that there was no addition to her armament. The Independencia again left Baltimore in the latter part of December, 1816, having at that time on board a crew of 112 men; and on or about the 8th of February following, sailed from the Capes of the Chesapeake on the cruize in which the property in question was captured. During the stay of the Independencia at Baltimore, several persons were enlisted on board her, and the claimant's own witnesses proved that the number was about thirty.

On her departure from Baltimore, the Independencia was accompanied by the Altravida, as a tender or despatch vessel. This last was formerly a privateer called the Romp, and had been condemned by the District Court of Virginia for illegal conduct, and was sold under the decree of Court, together with the armament and munitions of war then on board. She was purchased ostensibly for one Thomas Taylor, but immediately transferred to the claimant, Chaytor. She soon afterwards went to Baltimore, and was attached to the Independencia as a tender, having no separate commission, but acting under the authority of the claimant. Some of her guns were mounted, and a crew of about twenty-five men put on board at Baltimore. She dropped | down to the Patuxent a few p. 290
days before the sailing of the Independencia, and was there joined by the latter, and accompanied her on her cruize.

The District Court, upon the hearing of the cause, decreed restitution to the original Spanish owners. That sentence was affirmed in the Circuit Court, and from the decree of the latter the cause was brought by appeal to this Court.

February 28th.

Mr. *Winder*, for the appellant, (1.) argued upon the facts to show that there had been no such illegal outfit or augmentation of the force of the capturing vessel in our ports, as would entitle the original Spanish

owners to restitution of the captured property, on the ground of a violation of our neutrality by the captors.

2. He argued that even supposing the claimant, Chaytor, to be a native citizen of the United States, the capture was not invalidated by the circumstance of his commanding the capturing vessel. Being a public ship of a foreign state, this Court could not, upon its own principles, inquire into her conduct further than to see that she had a regular commission, signed by the proper authorities of that state.[1] It is perfectly consistent with the law and universal practice of nations for neutral subjects to take commissions in foreign wars.[2] This Court
p. 291 has determined that an alien may command a private armed vessel | of the United States, and cruize against their enemy, though it happens to be his own native country.[3] So also the prize ordinance of Buenos Ayres declares, that all officers of commissioned vessels or privateers belonging to that state, although they may be foreigners, shall enjoy all the privileges of citizens, whilst thus employed.[4]

But it may be said that the Spanish treaty of 1795, renders such an act criminal, and all its consequences void, and therefore this Court cannot listen to the claim of a citizen who has thus violated the supreme law of the land.

The answer to this is, that the treaty shows the idea of the contracting parties, that independently of its stipulations, their respective citizens and subjects might take commissions to cruize against each other without violating the pre-existing law of nations. The sole effect of the treaty is, to subject them to be treated as pirates by the opposite party, if it thinks fit. It excludes them from the protection of their own government, leaves them at the mercy of the opposite party, and excuses the government of the offenders from all responsibility to the other for their misconduct. They are not made pirates by the treaty, but only made liable to be considered as such by the party against whom they act. Would not the government in whose service they held commissions, have a right to retaliate, if they were treated as pirates, either by their
p. 292 own government, or by that | against which they acted; since by the law of nations the belligerent might grant to them as foreigners, and they might accept the commissions?

The treaty operates only between the contracting parties, and cannot interfere with the lawful powers and rights of other nations, under the law of nations; and between the parties, it only operates to give the belligerent, so far as the neutral contracting party is concerned, a right

[1] The Exchange, 7 *Cranch*, 116.
[2] *Vattel, Droit des Gens, l.* 3. *c.* 2. *s.* 13. 14. 16. *l.* 3. *c.* 7. *s.* 228. 230. *Bynk. Q. J. Pub. l.* 1. *c.* 22. *Du Ponceau's Transl. p.* 175.
[3] The Mary and Susan, 1 *Wheat. Rep.* 57.
[4] 4 *Wheat. Rep. Appx. Note* II. 30.

to treat the citizen as a pirate, without complaint from his government. It dispenses the offended party, so far as the other is concerned, from the obligation to observe the rules of civilized warfare, *quoad* its *citizen* thus implicated; but it can have no effect upon the rights of the other belligerent *quoad* the *officer* of that belligerent. The party, whose citizens or subjects they are, is not bound to treat the supposed offenders as pirates, and our Courts cannot so treat them in the absence of an act of Congress. The United States are not bound so to treat or consider them. They are simply bound to leave them to the discretion of Spain, and there the effect of the treaty stops. The prohibition of the treaty has its prescribed peril and effect, and cannot, at least judicially, be extended further. To make the treaty bind the United States to restore a prize made by one of its citizens under a commission from a foreign government would be to make a treaty stipulation between Spain and the United States operate to interfere with the undoubted rights of a third foreign power who is no party to the treaty. It would abridge and annul the effect of a commission, which, by the unquestioned law of | nations, he had a right, within his own territory, to grant. p. 293

The acts of Congress to protect the neutrality of the United States have nothing to do with it, because none of them extend to, or pretend to extend to, the acceptance of a commission in a foreign country by a citizen of this. And the silence of Congress on the subject is a strong legislative exposition of the treaty; for in making provision to preserve the neutrality of the United States generally, and especially in relation to the contest between Spain and her colonies, they have not rendered criminal such acceptance of a commission, and as they have manifested a spirit of some severity on this subject, and are silent on such a case, it is strong evidence that Congress did not feel bound to add any thing to the treaty; since, if they were bound, they would have done so in obedience to this treaty obligation of neutrality as they have done in other cases. Where the law stops, the Courts of justice must stop; *expressum facit tacitum cessare.* The plain object of the law was, even in cases within it, to affect the offending citizen; not to affect the foreign government who employs him; or, in other words, not to authorize a judicial interference with its belligerent acts. The statute committed to the judiciary all that the legislature intended to be within their competency. The rest it reserved for national adjustment by forbearing to submit it to the judiciary. The law must be taken as it is, not expanded by inference. To put a judicial rider upon it, is to legislate. The inference which | would vacate a capture under the commission would p. 294 be a supplement to the law, would be to legislate on a distinct subject, *i.e.* the effect of a belligerent act by a foreign state. The law is a restraining law, *in terrorem,* aimed at the citizens only. The inference deals with

a third party, a sovereign state, who is not subject to our jurisdiction; and acts in a way which the law does not prescribe; for the law authorizes nothing but the punishment of the individual. If more had been intended, more would, and ought to have been done; for the whole subject was well understood from 1794, to 1819, when the last act was passed. There is no positive municipal rule giving judicial jurisdiction as to such a commission, or any commission, even within the law, with reference to the effect of restoring a prize made under it. Every belligerent state has a right to decide upon the means of annoyance, which it organizes against its enemy within its own territory. If its commission to make war can be subject to ordinary judicial question in a neutral tribunal, where it cannot be heard and cannot condescend to appear, it is not a sovereign act. But the granting such a commission is the very highest act of sovereignty, and is peculiarly above ordinary judicial control in foreign countries. The legality, the force and effect of the commission itself, must defy ordinary judicial inquiry, or the belligerent can only authorize war so far forth as neutral tribunals shall think fit to suffer it.

A judicial recognition of the legality of the capture in question by a Court of prize at Buenos Ayres would undoubtedly have put the capture
p. 295 out of | reach of our Court. But the sentence of such a Court is no more a sovereign act, than the granting the commission. It does but ascertain the granting of the commission, and gives to it no new force or validity. The belligerent state is just as much answerable for the wrong done to the neutral state, if any there be, in granting the commission, after the sentence as before. A judicial sentence, in a case of prize, binds for no other reason, than that it is the act of the state to which the Court belongs. That it is a judicial sentence is of no importance. It is the sovereignty of the state, and its right of decision which gives to the sentence its conclusive character, in the view of foreign tribunals: and all this applies equally to the act of granting a commission, within the territory of the belligerent.

All the cases of this class, which have been decided in this Court, turn exclusively upon the fact of an illegal equipment of the capturing vessel within our ports, except that of the *Bello Corrunes*, in which the judgment does indeed refer to the national character of the claimant, Barnes, as repelling his right to claim.[1] But as the facts of that case will show that it might have been determined on the ground of the illegal equipment of the capturing vessel, without giving a construction to the treaty, or ascertaining the national character of the claimant, all that is said by the learned judge who pronounced the opinion of the Court in that case, on these subjects, may be considered as *obiter dictum.* |

[1] 6 *Wheat. Rep.* 125. 169.

3. But the claimant, in the case now before the Court, had ceased p. 296
to be a citizen, before he accepted the commission, and made the capture in question. He had expatriated himself, and become a citizen of Buenos Ayres, by the only means in his power, an actual residence in that country, with a declaration of his intention to that effect. This act is countenanced by the general usage of nations, and was not forbidden by any law of his own country. By the British law, not only are privateers and merchant vessels allowed to enlist foreign seamen, but the mere fact of two years service during war makes them British subjects.[1] A resident neutral in a belligerent country is subjected to the disabilities of the country in which he resides, so far as respects the opposite belligerent, and his trade is considered liable to capture and condemnation as enemy's property. Shall he not then be entitled to the correspondent advantages of his situation? The hostile character is fixed upon him by residence even if he goes to the belligerent country, with the desire of preserving his neutral character. Shall he not then be entitled to all the advantages of that character, when it is his avowed purpose and object to acquire it? Length of time generally decides the character of the residence of a neutral to be belligerent or not: but it is taken merely as evidence of his intention, and if that intention is unequivocally manifested in any other mode, his character is instantly fixed.[2] |

4. This capture being made by a public ship, which has come into p. 297
our ports, together with her prize goods, under the express permission of our government, the Court cannot interfere to restore the captured property to the original owners upon the ground that the capturing vessel has committed a violation of our neutrality. The ship itself must certainly be exempt from the local jurisdiction.[3] And if the ship be exempt, it is difficult to perceive how any other property of the same sovereign, which he has acquired and holds *jure coronæ*, can be subjected to the local jurisdiction by being brought into the territory under the same permission. Still less can the prizes made by a ship which is herself exempt from the jurisdiction of the local tribunals be subjected to that jurisdiction. These prizes are as much the property of the sovereign, *jure coronæ*, as the ships by which they are taken and brought in.

The illegal augmentation of her force by the capturing vessel in our ports, cannot forfeit the immunity to which she is entitled by the law and usage of nations. Enlistments of men for this purpose, are not presumed to be made with the assent of the belligerent sovereign, and are not to be imputed to him.[4] It is, therefore, an offence which is not to be visited on the sovereign or his property. Reprisals cannot lawfully be made, until application to him for redress has been made. Courts

[1] 5 *Wheat. Rep. Appx. note III.* 130.
[2] *Wheat. Dig. Cas. tit. Prize,* IV.
[3] The Exchange, 7 *Cranch,* 116.
[4] *Vattel, Droit des Gens, l.* 3. *s.* 15.

of justice cannot interfere in such a case, because the sovereign cannot
p. 298 condescend to appear in them, and they have no | regular means of knowing how far he approves of what has been done by his officers. But, upon remonstrance and diplomatic discussion, the whole affair may be heard, and remedies applied fit for the occasion. Judicial decision, if it can interfere at all, is inflexible; and when the fact is established, must make entire restitution of the captured property, however insignificant may be the augmentation of force by neutral means. Besides, it is bringing into judgment the highest concerns of nations to be determined by the testimony of the basest of mankind. The enlistment of a single seaman on board a single ship of a large squadron, may draw after it the restitution of a whole enemy's fleet. The only safe course then is, to leave matters of this sort to negotiation, or at least not to take cognizance of them in Courts of justice, unless upon the application of the offended state, as in the analogous case of a capture within neutral territory.[1]

5. But, at all events, the condemnation of the prize goods, which took place at Buenos Ayres, in a Court of the captor, is conclusive to preclude this Court from taking jurisdiction of a question which has already been determined in a competent tribunal.

Mr. *Tazewell*, contra, stated, that three principal errors were alleged by the appellant in the decrees of the Courts below: 1. That the facts
p. 299 assumed by those Courts did not warrant the decrees. 2. That | the condemnation in the tribunal of prizes at Buenos Ayres precluded the Courts of this country from inquiring into the legality of the capture. 3. That our Courts have no authority to make that inquiry because the facts of the case involve the sovereign rights of an independent state.

As to the first objection, it is not necessary to discuss it until the last is disposed of. Jurisdiction must be shown to exist, before its rightful exercise can be proved. He would, therefore, invert the order of the argument, and examine the last mentioned proposition before the others. It would be shown to be the only question of real difficulty in the cause.

The argument on this proposition concedes to the neutral *sovereign*, or state, the very right which it denies to the neutral *judiciary*. Now, to the belligerent sovereign, the effect is precisely the same, whether the interference with his rights be by the executive and legislative departments, or by the judiciary alone. In either case his rights are examined into, and he may be deprived of them. To the neutral state, also, the effect is the same in both cases, so far as foreign states are concerned; since, in both, the nation is equally responsible for the act done. It is no answer to the reclamation of a foreign sovereign to say, that he has been injured by the judiciary only. To him all the departments of the government make but one sovereignty. This is represented by the

[1] The Anne, 3 *Wheat. Rep.* 435.

executive, of which the judiciary is regarded but as an emanation. It may be, and undoubtedly is, a matter of great moment to the | *neutral* p. 300
state itself, that its powers be legitimately exercised by those only to whom they have been confided by the municipal constitution. But this is a mere domestic inquiry, in which no foreign state has any concern, nor ought to be permitted to enter. Is it not strange, then, that it should now be presented to us in a litigation between two foreign subjects ?

The question being raised, however, it must be discussed ; not for the sake of the parties, but of the Court itself. Let us then concede what the argument asserts, and it has no application to the cause. For justice is blind, and knows not of the existence of the sovereign, or of his rights, until made manifest by its own record. Nor will it notice even what its own record may disclose, unless the matter be therein duly and orderly set forth, *i.e.* by proper parties—in proper time—and in proper form. How, then, is this fact of sovereign right to be duly and orderly disclosed, so as to be made manifest to the Courts of justice, and to shut the judicial eyes to every other fact in the cause ? This, although apparently a mere technical question, is one of great importance, especially on account of the practice which has been hitherto pursued by the Courts of the United States in cases of this sort. And at the very threshold of the inquiry it is plain, that the sovereign who denies the authority of the Court to decide, must not *answer*. If he does, he voluntarily submits to, nay, invites the exercise of the very authority which he denies can be exerted. His averments, too, may be traversed, and issue being joined on the | traverse, must be decided in some way ; and p. 301
so his sovereignty denied by judicature. Neither can he plead in *abatement*, or any dilatory exception ; for he may be decreed to answer over. Neither may he *protest ;* for the question cannot be raised by a naked protest ; and if he couples his protest with an answer, if he does not so overrule his protest, his answer leaves him as before. If he adopts the practice pursued in the case of the *Cassius*,[1] and *suggests* his exemption upon the record, he will be met, as in that case, by a replication to his suggestion, and it becomes a mere plea in abatement ; for whatsoever one party may affirm, the other may deny.

These are the only known modes of *defence*, and none of them can the foreign sovereign adopt, without abandoning the exemption claimed for him by the argument. What then must he do ? He must not defend himself in judicature at all. He must apply to the sovereign of that tribunal where his rights are drawn in question, and refer to his accountability. This sovereign, if he sees fit, will suggest for him ; if he does not, he will refuse to do so, and meet the consequences. To a suggestion coming from this quarter there can be no replication ; for he who makes

[1] United States v. Peters, 3 *Dall.* 123.

it is no party in interest. Nor is proof necessary to establish it; for it comes duly authenticated. Such was the course pursued in the memorable case of the *Exchange*,[1] where a suggestion of the sovereign rights of the
p. 302 Emperor | Napoleon was made by the executive government; although proof of the commission of the commander of the vessel was unnecessarily superadded. This is the only proper mode in which the matter of sovereign right can, duly and orderly, be set before the Court. It avoids all the technical difficulties of pleading and practice, and places the matter where, according to the argument, it ought to rest, with the sovereign.

This course has not, however, been adopted here; and therefore the Court will not take judicial cognizance of the fact of sovereign right, involved in the determination of the cause: and the argument insisted on, even if abstractly true, has no application to the cause, as presented upon the record. The matter is reduced to a mere question of practice, settled by the form of the pleadings, which it is now too late to amend.

Suppose, however, it were *res integra*. The Court must contrive some proper form in which subjects of this sort may be brought before it. In adjusting this form, it is a sound and a safe rule to be followed, to attain the object by *known*, rather than by *untried* means; to adhere to ancient forms, as far as may be done; and, if possible, to alter nothing. If this be so, whatever may be the rule adopted by the Court, the case will still be found exposed to the objection before stated: for the record will not show any information derived from *our* sovereign, but the very reverse. It is only important then to examine the question, whether the information of the sovereign or executive government be the proper and
p. 303 only | standard to which the Court must refer, in matters wherein not our own people, but foreign states are concerned. Whatever the theory may be on this subject, all know that, in point of fact, Courts of justice do and must decide upon the rights of sovereigns, and that even in governments the most absolute. For these Courts must necessarily decide upon the rights of private individuals and corporations, and these are oft-times so interwoven with the rights of their sovereigns, that to decide upon the one, is to decide upon the other, not only in *form*, but *effect* also. Treaties and war create and destroy rights; and nations as well as individuals, derive their rights from these public transactions, which therefore the tribunals of justice must pass upon. Such, among many others, was the case of the *Amiable Isabella*, where the sovereign rights of Spain and the United States were involved, and were determined by this Court.[2] The rights of sovereigns must then be settled by Courts, and may be settled in different modes. This supposition constitutes a part of our complex system of government. Sovereign rights may be settled, not only in the Federal Courts, but in the State Courts:

[1] 7 *Cranch*, 116.

[2] 6 *Wheat. Rep.* 1. 50.

and to guard against the effects of a conflict of opinion in such cases between the different local tribunals, appeals are brought from the State Courts to this Court. It would be in vain, however, to translate a cause here from the State Courts, if this Court might decide it differently from the other departments of the government. This must not be, however. The | people, although sovereign, can have but one will; and p. 304
that will must be spoken by all their agents, or our government is a many-headed monster. The question, then, at last results in this: In what department of the government does this will, in relation to *foreign* states, reside? For wherever it does reside, that will must be uttered here, or we shall have two conflicting wills on the same matter. Now, I care not *where* it resides, if it resides any where: and the argument and necessity both prove that it must reside *somewhere*. If then it resides *here*, in this Court, the argument is radically defective: for then it follows that judicature may decide on sovereign rights. And if it resides not here, but elsewhere, it must be communicated from thence hither, and constitute the law of the Court; or our government is a monstrous anarchy. Some mode of communication between the executive government and the judiciary must be contrived. The only doubt is how this communication is to be made. And whatever course may be a proper one, none has been adopted in the present case, and the Court cannot therefore take notice that any sovereign rights of Buenos Ayres are involved in the cause. You cannot know the fact, and must proceed as if it did not exist. This does not impugn judicial independence. The judiciary are not independent of the law. They utter the legislative will of the people, when declared by the legislature: they pursue its executive will when communicated by the executive department. All nations have felt the necessity of some such course; the only question is as to the form, which must depend upon the municipal | constitution and the practice p. 305
of each particular country. Thus, in England all rights of prize are originally vested in the crown. Hence, the Courts of Prize take their law from the King's instructions. The captors cannot proceed to adjudication against the will of the crown. Hence, in the case of the Swedish convoy, the condemnation of the captured property for resistance to the exercise of the right of search was limited to the merchant vessels, although the same penalty would have been applicable to the convoying frigates, had not the crown interposed its prerogative, and from reasons of state, caused the latter to be restored to the foreign sovereign.[1]

Heretofore the subject has been examined as a technical question of pleading and practice merely. Let us now examine it as one of evidence. Of whom then is this exemption from judicial investigation affirmed? A sovereign state. But is Buenos Ayres a sovereign state?

[1] The Maria, 1 *Rob.* 340.

This Court has repeatedly decided that it will not undertake to determine who are sovereign states: but will leave that question to be settled by the other departments of the government, who are charged with the external affairs of the country, and the relations of peace and war.[1] It may, however, be said that both the judiciary and the executive have concurred in affirming the sovereignty of the Spanish Colonies,
p. 306 now in revolt against the mother country. | But the obvious answer to this objection is, that the Court, following the executive department, have merely declared the notorious fact that a civil war exists between Spain and her American Provinces; and this so far from affirming, is a denial of the sovereignty of the latter. It would be a *public*, and not a *civil* war, if they were sovereign states. The very object of the contest is, to decide whether they shall be sovereign and independent, or not. All that the Court has affirmed is, that the existence of this civil war gave to both parties all the rights of war against each other. But belligerent rights are not regalian rights. Now, in the case last cited,[2] the Court decided that the seal of this supposed sovereign state might be proved like any other matter *in pais*. If it were really a sovereign state, the seal would prove itself. The more the subject is examined, the more apparent will it be, what confusion and mischiefs must flow from the judicial department assuming the right to acknowledge the existence of her sovereignties, especially in the present mutable state of the world. Cases of depositions and restorations are continually occurring, of revolutions and counter-revolutions, which present the most complicated questions of strict right and political expediency, the determination of which must be left to the other departments of the government.

But if it were true in fact, and well pleaded, that the *res* now in controversy is a sovereign's right; still, it would not be correct to say,
p. 307 that *all* sovereign | rights are exempt from judicial examination. There must be some exceptions to the universality of the rule. The exemption only applies to the regalian rights of the sovereign; those which are necessary to maintain his faith, dignity, and security, and to none else. Such are his august person, his ministers, his armies and fleets. These are protected from the interference of foreign judicatures, because they are essentially necessary for these purposes; they make up sovereignty itself. And nothing else which is not within the reason, is within the rule of exemption. Suppose a royal stag or horse escapes into a foreign state, and is there sold in market overt as an estray; or suppose the ship of a foreign sovereign is wrecked on our coasts, and a claim for salvage of the materials interposed. Would you stay your hand from

[1] Rose v. Himely, 4 *Cranch*, 241. 292. Gelston v. Hoyt, 3 *Wheat. Rep.* 246. 224. United States v. Palmer, 3 *Wheat. Rep.* 610. 634.

[2] The United States v. Palmer, 3 *Wheat. Rep.* 635.

a dread of the sacredness of the subject matter? The privilege of sovereignty cannot protect these cases. No authority can be shown to prove it; on the contrary, the authorities are clearly the other way. Thus, all prizes made in war are the property of the sovereign, *jure coronæ*, and this, whether the prize be taken by a public or a private ship. But it is not to be argued (in this Court at least) that such prizes may not be taken out of the hands of the captors (whose possession is that of their sovereign) and restored by the neutral tribunal, within whose jurisdiction they may happen to come, if made by *privateers* in violation of neutral territory or of neutral rights. And if so, why may not prizes made by *public* ships be restored under like circumstances? They both come | within the same reason, and, therefore, should fall p. 308
within the same exception to the general rule. The rule, then, if true at all, must be limited as I have stated; and if so, it will not apply to the present case. It may, indeed, protect the public ship herself, but not her prize goods. These are not the regalian rights of the sovereign; they are a mere accidental, military possession, which are not indispensably necessary to maintain his faith, dignity, or security.

Again; the argument which asserts exemption for sovereign rights does not confine itself to the rights of a belligerent, but equally applies to all sovereigns, whether in peace or war. But if a wrong doing sovereign may claim this exemption, what becomes of the rights of the injured sovereign? Must he submit, or hold his hand, and ask redress of the offenders? Every objection which applies to the one, exists in equal effect as to the other; and if the tortfeasor may not pursue this course, he must not, by his own act, constrain the injured party to adopt it. To guard against this conflict of dignities, the public law has wisely settled the rule, that each sovereign is supreme at home; all are equal on the high seas, except in war, and then the comity of nations, and the necessity of the case, refers it to the *arbitrium* of the captors. But this rule of comity protects not violators of the neutral territory, within which its sovereign is supreme; for the implied pledge given to a foreign state, of exemption from the local jurisdiction, is violated the moment it infringes our laws, treaties, and sovereign rights. The fiction of | extra-territoriality only applies to the peaceful observers of this implied p. 309
pledge. The implication is repelled, and the pledge forfeited by abusing the rights of hospitality and asylum. This exception to the rule is recognized distinctly by the Court in the case of the *Exchange*,[1] and it was upon this ground that the Court has interfered in the whole class of captures made by means of illegal armaments in our ports.[2] The question in every one of these cases was not as to the character of the wrong doer,

[1] 7 *Cranch*, 116.
[2] The Divina Pastora, 4 *Wheat. Rep.* 52. and cases collected in note *a*. *Ib. p.* 65.

but as to the nature of the act done, and the *locus in quo*, it was committed. No inquiry was ever made whether the capturing vessel was public or private; but only whether our neutrality had been violated. And the principle to be extracted from them all is, that the neutral tribunal may properly restore any prize brought within its territory, which has been made in violation of neutral laws, or rights, or obligations. Within this principle the present case is found; and, therefore, it is not universally true, that the rights of sovereigns are exempt from judicial examination.

The argument we are discussing concedes, that the injured sovereign himself may restore, although it denies the power of making restitution to his Courts. But the effect to both parties is precisely the same, whether the restitution be made by sovereign or Court, as has been already shown.

p. 310 Still, granting that it may be done by the sovereign only; | who is sovereign here, *quoad hoc*? It must be the judiciary: since wherever individual rights are involved, whether arising under war, or treaty, or municipal regulations, the judiciary in this country must decide.[1] Where indeed no case is made upon which the judiciary can act, then the executive may interfere, as it did in the commencement of the European war in 1793, in the case of the *Grange*. But even here the genius of our institutions requires, that the preliminary inquiry should be made through the judiciary, which is the proper tribunal to make such examinations, in which private rights are for the most part involved. Such was the course pursued in the case of *Thomas Nash* alias *Robbins*. The parties, one of whom was the king of Great Britain, could not appear in Court; the executive acted therefore by judicial means, and the facts being judicially ascertained, it proceeded to carry into effect the treaty.[2] If then the sovereign must submit to his co-equal sovereign, as the argument concedes, and the judiciary is invested with this portion of sovereignty, the case is clear, and the argument has no application to it. Nor does this reasoning exclude the executive action, but yields to it in every instance where no case is made adapted for judicial determination; and even where such a case is made, the executive may interpose by *suggestion*, by which the Court will be bound as they would by an act of the legislature in a case fit for the exertion of legislative power. |

p. 311 But suppose the judiciary not to be sovereign as to this matter. Yet, whoever be the sovereign, as to it, he need not act directly; but may delegate his power of decision and action to another: still it is the sovereign who acts. If the executive be sovereign, this delegation is effected by *suggestion*, or the want of it, as the case may be. If he means that the judiciary should decide for him in a particular way, he suggests it. But if he is content to take the lead from the judiciary, and to adopt

[1] See 3 *Dall.* 13.
[2] Speech of Mr. (now Chief Justice) MARSHALL, 6 *Wheat. Rep. Appx.*

its construction, he declines to suggest. In the latter case, the judiciary acts according to the sovereign will, because he adopts theirs. In the former, the same thing is effected, for the judiciary adopt his. By this means that harmony is produced which can be effected by no other.

But if it be thought that the legislature is the true sovereign, *quoad hoc*, then the legislative will has been distinctly expressed in the Neutrality Act of 1794, c. 226. It is in vain to contend that this statute does not apply to public or national ships. For not only are its terms sufficiently copious to embrace *any* ship, but their context plainly shows that they were designed to apply especially to such ships. Here the learned counsel analyzed the act, in order to show that it extended to public, as well as private armed ships ; and insisted that this construction was confirmed by the consideration that both the cases were equally within the mischief intended to be provided against, which was the violation of our own territory, and of neutral relations and obligations. Nor was there any weight in the argument which | would confine the authority of p. 312
the Court under the act to captures made within our territorial jurisdiction. For although the 6th section expressly gives cognizance over that class of cases, the history of the law on the subject plainly proves that this was merely an affirmative position, and was not meant as an exclusion of judicial authority in other cases. The provision was meant to define the territorial jurisdiction of the Union, and to settle a supposed doubt with the Courts, which did not exist in fact. It was therefore merely declaratory of the law in that case, and could not be intended as a restriction upon the general authority of the Courts. If this were not so, what would become of the cases, occurring before this statute was passed ? or of the numerous cases since decided, of captures *without* our limits, by means acquired *within* them ? This series of adjudications manifestly shows that the Courts exercise their power independently of the statute, the sole effect of which is (of the 6th section at least) to recognize an existing authority in a particular case, and not to limit it to that case only.

But even if this be not so, what is a capture within our waters ? Is it not to all legal purposes made within our territory, when the captor is within and the prize without, the potential force being exerted within? or where the actual force is exerted without, by boats sent from within ? And if so, it proceeds solely on the ground that the *locus in quo* is to be fixed, not by the place of seizure, which in both the supposed cases is without, but by the source from whence the exerted force proceeds. Consequently, a capture | made actually on the high seas, by means p. 313
acquired here, is a capture within our territory.

It is clear then, upon principle, that the property even of a sovereign acquired in war, within a neutral territory, or by means therein illegally

obtained, may be subjected to judicature, and restored: and this whether the prize is made by a public or a private cruizer. Nor is the dignity of sovereigns injuriously affected by such a proceeding, which being *in rem*, the sovereign is not constrained to defend himself before the Courts of justice, but may properly apply to the other sovereign for redress, by whose suggestion, duly made, the judiciary must be bound.

That which is thus clear upon principle is equally established by authority. In the history of transactions of this nature, it will be found, that wherever the neutral state interferes to vindicate its own neutrality, no distinction is made whether that neutrality be infringed by a public
p. 314 or a private ship.[1] Both | France and England restore the property of their subjects found on board of prize ships sent into their ports by the vessels of other powers, and that whether the capturing vessels are public or private.[2] During the beginning of the war of the revolution, the prizes sent into France by the *Alliance* frigate were restored by the tribunals of that country, if the property of her friends. In the case of the Swedish convoy, in the English High Court of Admiralty, the crown declined proceeding against the Swedish frigates, as has been before mentioned; otherwise, Sir W. Scott declared, that he would have
p. 315 condemned | even those public ships.[3] But how could he, unless they were subject to judicature? It may be said, that they were regarded as *qua* belligerent, having forfeited their neutral character by attempting a resistance to the right of search. Be it so. Then we may, *vice versa*,

[1] *Lee on Capt.* 116. 121. 123. edit. of 1803. 'In the year 1654, a captain of a *Dutch man-of-war* met with an English ship at sea, running into the port of Leghorn, and seized her even when she was coming to anchor; the Duke of Tuscany complained of this to the States General, but without redress. He, however, showed his resentment of it by *condemning the ship which had taken the Englishman.*' *p.* 121. This book, (*Lee on Captures,*) which is called in the preface, 'an enlarged translation of the principal part of Bynkershoek's *Quæstiones Juris Publici,*' is in fact little more than a very poor translation of that treatise. In the original text of Bynkershoek, it by no means appears that it was a *public* ship which had taken the Englishman in a neutral port. His words are: 'Ex factis, quae postea inciderunt, etiam haec videntur probasse Ordines Generales; quum enim anno 1654, *Navarcha Hollandus* navem Anglicam, in mari deprehensum et ad portum Liburnensem fugientem, occupasset, etiam tunc, cum navis Anglica jam funem in terram projecerat, Dux quidem Tusciæ ea de re questus est ad Ordines Generales, sed nequicquam questum esse legimus. Vide tamen, an non ipse dux id postea vindicaverit; publicata nempe nave, quae opportunitatem proebuerat occupandae istius Anglicae.' (*Q. J. Pub. l.* 1. c. viii. *p.* 64. *Edit. Lugd. Batav.* 1752.) which Mr. DUPONCEAU, in his elegant and accurate translation, thus renders: 'From facts which afterwards took place, the States General appear to have approved thus much; for when in the year 1654, a *Dutch commander* met an English vessel on the high seas, and pursued her flying into the port of Leghorn, where he took her at the moment she was coming to anchor, the Grand Duke of Tuscany complained of it to the States General, but we read that he complained in vain. He, however, afterwards, took satisfaction by condemning *the Dutch vessel* that had made the pursuit and occasioned the capture of the English one.' *Duponceau's Bynk. p.* 63.

[2] *Ord. de la Mar. Art.* 9. *Des Prises,* 15. 2 *Sir L. Jenkins' Life,* 780.

[3] 1 *Rob.* 377.

condemn a public ship, or her prizes, for unneutral conduct, by which they lose their extra-territorial character conferred on them by a fiction which ought no longer to be regarded than it subserves the purposes of justice. There are numerous examples to show that there is nothing so sacred in the rights of sovereigns as to prevent judicature from dealing with them, both directly and incidentally. In the case of *Duckworth* v. *Tucker*, the sovereign rights of Portugal were determined by the English Court of C. B., in a private controversy between two British Admirals about prize money.[1] In the *Canton of Bèrne* v. *The Bank of England*, that state appeared as an actor in the High Court of Chancery, which had the control of the fund, which the government of Berne laid claim to, as a part of its public treasure.[2] As to the case of the *Exchange*, in this Court, it must be repeated that it does not go on any extravagant notion of the exemption of sovereign rights from judicial scrutiny; but on the ground of preserving the national faith, and that the ship entered under the pledge of an implied license which she had not forfeited by any misconduct. Had she done so, she | would have been condemned p. 316
as unhesitatingly as the most insignificant privateer. It is only necessary to recur to the case of the *Cassius*, a public armed ship of the French republic, and to the words used by the Court respecting that case in the *Invincible*,[3] to show that it never has recognized any distinction in this respect between public and private armed ships.

The learned counsel then proceeded to examine the testimony in the cause, to show that it clearly established the fact of an illegal outfit and augmentation of force, by the capturing vessels in our ports; and, lastly, answered the argument attempted to be drawn from the alleged condemnation at Buenos Ayres, by stating, that the decree was not established in proof, and that if it were so, it could not avail as a bar to the present proceedings, as the property was at the time in the custody of our Court, and had been actually sold by consent of the claimant who now sets up the decree in the foreign tribunal.

Mr. *Webster*, on the same side, (1.) argued, that there was no force in the general objection set up by the captors, that the ship which made the capture being a public ship; we could not examine into her acts, because it would be to interfere with the sovereign rights of the state to which she belongs. He denied that there was any such general principle, and no book, or case, or even *dictum* could be found to | support p. 317
it. Judicature deals with sovereign rights perpetually, in our Courts, in England, and in every country, and in every case where the government is a party to the suit. Is it meant that judicature cannot deal with sovereign rights, neither domestic nor foreign? All history shows the contrary. If it were so, no sovereign could come into Court. The

[1] 2 *Taunt.* 33. [2] 9 *Ves.* 347. [3] 1 *Wheat. Rep.* 253.

great political powers of government, as those of peace and war cannot indeed be submitted to judicial decision; but proprietary interests, in which the public are concerned, are settled every where by the tribunals of justice, as in the familiar instances of inquests of office, and writs of intrusion. So an ejectment may be brought for the crown lands, the most favourite fief. And nothing can be more sovereign than the right of prize, *jure belli;* it is a great branch of the prerogative; yet every body may contest it, and the king must claim, and if he cannot make out a title he must lose it. Any jewel in any king's diadem may become the subject of judicial discussion. The extent and rights of the prerogative are discussed in every Court in England; and all the powers of this government are discussed in this Court, and in all the State tribunals. The government of the United States, and of the States, are sovereign, and cannot be sued; but in a contest between individuals or corporations, the sovereign rights of the Union and the several States may be decided.

Judicature may then deal collaterally with sovereign rights, and wherever the sovereign himself is *actor;* wherever he brings the suit.
p. 318 The true proposition, | therefore, must be, that the Prince cannot personally be sued in his own Courts, or in foreign tribunals. As to the domestic forum, two reasons are given why the king cannot be summoned or arrested in any civil or criminal suit. The first is, his supereminency; and the second, that justice is administered by him, and in his name.

These reasons do not apply to a foreign country. He has no supremacy there, nor is justice administered in his name. Sovereignty is local; and when the sovereign transcends the limits of his land, he transcends the limits of his prerogative. The reason why he is not amenable to the foreign tribunal grows out of international law, and does not spring from the municipal code. It is not for want of jurisdiction ample enough to reach him; but that having come into the territory of another sovereign, under his permission, either express or implied, it would be a violation of the public faith to subject his person to any kind of restraint. The same immunity is extended to his ambassador, for the same reason; and to support this immunity, the fiction of extra-territoriality has been invented, and applied to the cases of the army, or navy, or single ship of a sovereign coming into the territory of another. Being there under the license of the local sovereign, they are at liberty to remain and depart unmolested. Not that the foreign sovereignty exerts itself within the territory of another state, but that the local sovereignty is suspended from motives of comity, and a regard to the plighted faith of the nation.
p. 319 The exemption probably extends even to private merchant | vessels; which proves clearly that it does not rest on any right of sovereignty. But the permission may be withdrawn both as to these, and as to public vessels, if the indulgence be abused to the injury of the power by which

it is granted. No neutral nation is *bound* to admit the belligerent ships of war within its waters, unless under treaty stipulations; and it may concede the privilege on such terms and conditions as it thinks fit. The presumption or fiction under which the license was granted ceases, the moment the license is revoked; and the license is revoked as soon as the terms and conditions on which it was granted are violated. Still less can a mere general permission to the ships of a foreign state to come into our waters, be construed into a license to violate our laws, and treaties, and neutral obligations. Nor is it necessary here even to contend that the ship herself is subject to the local jurisdiction. We proceed against her prize goods, found within our territory. It is alleged, that they are held by the right of a foreign sovereign, or under a sovereign, and it is impossible to avoid inquiring into the foundation of this right. It is the inherent vice of the opposite argument, that it concedes this position; and in making that concession it yields the inevitable corollary that this sovereign right is not exempt from judicature.

2. If we proceed then to examine into the foundation of the right, we shall find that the Spanish consul here claims, in behalf of his fellow subjects, their property, which has been taken from them by a cruizer sailing under the flag of the enemy of Spain, | but equipped in our ports, p. 320
and manned with our citizens, contrary to our municipal laws and the 6th and 14th articles of our treaty with Spain. The true interpretation of the 6th article raises our national duty, wherever a capture is made by our citizens of Spanish property, which is afterwards brought within our jurisdiction. We are to endeavour to protect the vessels and effects of Spanish subjects which *shall be within the extent of our jurisdiction* by sea or by land,' as an act distinct from that of using our 'efforts to recover and cause to be restored to the right owners their vessels and effects which *may have been taken from them within the extent of said jurisdiction.*' It is a reciprocal duty of both states, and without invoking the aid of this article, we should find it difficult to maintain our claim upon Spain for the property of our citizens carried into her ports by French cruizers, and condemned by French tribunals within her territory. As to the 14th article, it is pretended that it attaches a mere personal penalty to the offending party, and operates merely to abandon our citizens, who may violate it, to be punished as pirates at the will of Spain. But the mutual prohibition to the citizens or subjects of each power from taking commissions to cruize against the other makes such conduct unlawful to every intent and purpose. The penalty of being punished as pirates is merely superadded as a consequence which would not necessarily have followed from the prohibition without a special provision to that effect. But the invalidity of the captures made under a commission thus unlawfully taken is a necessary | and ineviteable consequence p. 321

of the prohibition itself. This article cannot therefore be considered as merely monitory: the words are promissory; they express the undertaking of the two governments and their reciprocal duty. Nor is it confined to captures made by private armed vessels. It is true that the first clause of the article speaks of 'any commission or letters of marque, for arming any ship or ships *to act as privateers.*' But in the Spanish counterpart of the second clause, these last words *que obren como corsarios* are dropped, although they are retained in the English. The Spanish counterpart speaks generally of '*patente para armar* ALGUN BUQUE Ô BUQUES *con el fin de persequir los subditos de S. M. catolica,*' which obviously extends to public as well as private cruizers. As to our municipal laws, they are not confined to acts done within the limits of the United States. They are full of provisions making it unlawful for our citizens (without those limits) to fit out and arm, or command and enter on board of, a foreign cruizer intended to be employed against powers in amity with us.[1] Whether, therefore, the offence in this case was committed within or without the United States, the illegal equipment or augmentation is within the statutes, and consequently the property acquired under it must be restored to the true owners.

3. What gives additional strength to this national obligation, is the fact that the claimant in the present cause, and those for whom he claims
p. 322 as captors, | are citizens of the United States, who claim a title to property acquired in violation of the laws and treaties of their own country, in a Court of that country.

But it is said that the claimant, Chaytor, has ceased to be a citizen of this country by what is called an act of *expatriation*, (but which ought rather to be called *emigration*,) and has become a citizen of Buenos Ayres. Now it cannot, and certainly ought not to be denied, that men may remove from their own country in order to better their condition, or to avoid civil and religious persecution. But it does not follow that under all circumstances, and for all possible reasons, a person may shake off his allegiance to the land which gave him birth. The slavish principle of perpetual allegiance growing out of the feudal system, and this fanciful novelty of a man being authorized to change his country and his allegiance at his own will and pleasure, are both equally removed from the truth on this subject. Whatever doubtful cases may be supposed, this much may be affirmed with certainty, that there must be an actual change of the party's domicil, and that this must be done, not merely with the intention of remaining in his adopted country, but it must not be coupled with a design fraudently to evade the laws of his native country. No act whatever of a foreign government can dispense with the allegiance of a citizen, and authorize him to violate our penal code or our treaties

[1] *Act of* 1797, *c.* 1. *Act of* 1817, *c.* 58. *s.* 2. *Act of* 1818, *c.* 83. *s.* 4. *s.* 10.

with other nations. This is a prior, paramount obligation, which must be first fulfilled, before he assumes any new and inconsistent duties. Even if there had been, in this case, an actual *bona* | *fide* change of domicil p. 323
animo manendi, so as to entitle the claimant to all the privileges of commercial inhabitancy under the law of prize or the revenue laws, it does not follow that he can with impunity levy war against the United States or their friends. And even if it be admitted that he might defend his adopted country, it does not follow that he may attack his native country, or those whom she is bound to protect. Can it be sufficient to legalize such an act that he has made his election, and that the foreign government has ratified it? Is it not manifest that it was done, *cum dolo et culpa*, for no other purpose than to evade and violate our laws? In this respect, it is impossible to distinguish between the neutrality acts, and other laws, such as the statutes of treason, or any other the most intimately connected with the national safety and existence. But it is unnecessary to dwell upon this point, as it is the settled doctrine of this Court, that a citizen of the United States cannot claim in their Courts, the property of foreign nations in amity with them, captured by him in war, even if the capturing vessel be in other respects lawfully equipped and commissioned;[1] and that an act of expatriation cannot be set up to justify such a capture, where the removal from his own country was with the fraudulent intent of violating its laws.[2]

Even admitting that foreign armed vessels may, in the absence of any express prohibition, enter our ports for the purpose of refreshment, or of making repairs, and will not thereby be subject to the local | law p. 324
and judicature, it does not, therefore, follow that they may make extraordinary repairs so as to be transformed in the species. The implied license may extend to a mere replacement of the original force; but it cannot extend to such an augmentation of the force as would be inconsistent with the neutral character of the power granting the license. It cannot extend to acts done subsequent to the vessel entering the neutral port; in other words, to a violation of the license itself. The vessel may remain in the same condition as she came, but she may not increase her capacity for war by the addition of neutral means, either in munitions or men. Nor does it follow, in any supposable case, that because the capturing ship herself cannot be made answerable to the jurisdiction of the local tribunals for violating the laws and treaties of the neutral state, that her prizes are entitled to a similar exemption. They do not stand on the same principle or reason. The ship of war ought not to be detained from the public service of the sovereign to whom she belongs. Neither his dignity nor safety will permit it. But neither the prize vessels

[1] The Bello Corrunes, 6 *Wheat. Rep.* 152. 169.
[2] Talbot v. Janson, 3 *Dall.* 133. 153. 164.

or goods captured by her are necessarily connected with his military power.

5. As to the facts of the illegal equipment and augmentation of the force of the capturing vessels in our ports, they are sufficiently established by the testimony. Although there may be some discrepancies in their evidence as to certain immaterial circumstances; yet, as they all concur in proof of the material facts, and their testimony is uncontradicted
p. 325 even by the claimant's witnesses as to some of the | most important, they are entitled, in this respect, to credit. Their testimony, taken in connection with the *res gesta*, which are admitted on all hands, satisfies the rule which the Court has laid down in this class of causes, that the fact of illegal equipment in violation of our neutral duties, must be proved beyond all reasonable doubt.

6. Lastly: As to the pretended condemnation at Buenos Ayres. Independent of the objection which has already been stated to it, the question which has been here raised as to the capture having been made by military means obtained within our neutral territory, could not possibly have occurred in the course of the prize proceedings in the Court of the belligerent state. The goods being confessedly the property of its enemy, and liable to capture and condemnation as prize of war, the plea that the capture was made in violation of our neutrality could not be set up by the Spanish owner. Being an enemy, he had *no persona standi in judicio* for that purpose. The government of the United States must have interposed a claim upon this ground, or have authorized the Spanish claimant to interpose it. Unless this were done, the goods were clearly liable to condemnation as prize of war, as they would be in the analogous case of a capture actually made within the neutral territory itself; where, unless the objection is made by authority of the neutral government, it cannot be made by the enemy owner, who, in his character of enemy, is not injured by it. We need not, therefore, directly impeach the validity of the condemnation at Buenos Ayres, so
p. 326 far as the rights | of the two belligerents merely are concerned. We only repudiate the claim of one of our own citizens, who comes into our Court, and sets up the foreign sentence, which was obtained by him in fraud of our laws, as an excuse for the violation of those laws. To the Prize Court of Buenos Ayres it was sufficient that, as captor, he had a right to stand upon his commission issued by that state, and to insist upon the condemnation of his prize taken *jure belli*. But in this Court that very commission disables him from claiming any title acquired under it, for reasons which could not be urged in the Prize Court of Buenos Ayres, where the Spanish owner could not appear at all unless by authority of the government of the United States. It is not, therefore, a *res adjudicata*. Nor is the claimant a *bona fide* purchaser of the prize goods,

ignorant of the fraudulent and illegal conduct of the party by whom they were captured and sold to him. The claimant, Chaytor, is himself that party, and he can no more set up the sentence of condemnation for his protection, than he can the pretended act of naturalization to cover his crime in confederating with one of the belligerents to violate the laws, and treaties, and most solemn obligations of his own country.

Mr. *D. B. Ogden*, for the appellant, in reply, stated that he should, for the purposes of the argument, take it for granted that the capturing vessel, the Independencia, was in point of fact a public ship belonging to the government of Buenos Ayres. The flag and commission are conclusive evidence of that fact. | It is contended, on the other side, p. 327 that the Court is bound to interfere and restore the captured property, to the original Spanish owners, because it is said that, though the rights of a sovereign are involved, yet as he cannot appear in a Court of justice to claim, these rights must be determined without hearing one of the parties, who is most materially interested in asserting them. And it is said, that the foreign sovereign must state his claim to the executive government, and that it must be brought to the notice of the Court by a suggestion from the latter. So that according to this doctrine, the Courts of this country, could never listen to the complaints of foreign states, who had no minister to represent them here ; and their property may be condemned, and their most sacred rights violated, without their being present, or heard. But we never meant to contend, that sovereign rights could not be discussed and determined in a Court of justice, and that this suit could not be maintained, because the sovereign rights of Buenos Ayres might be incidentally drawn in question : but because this was a public armed ship of that state, coming into our waters, with her prize goods, under the express or implied permission of our government ; and while here she was exempt from the jurisdiction of the local tribunals.

But we are told that Buenos Ayres has not yet been acknowledged by the government of this country as an independent state ; that she is a mere revolted colony of Spain, and her cruizing vessels cannot be entitled to the privileges and immunities of the public ships of an old established sovereignty. The answer to this position is, that | though p. 328 the independence of the South American provinces has not yet been acknowledged by our government, the existence of a civil war between these revolted colonies and the mother country has been acknowledged, and this Court has followed the executive government in considering them entitled to all the rights of war against their enemy. Such is the consequence which the writers on the law of nations attribute to a civil war between two portions of an empire. It is assimilated to a public war. They are belligerents in respect to each other ; and all other

powers, who take no part in the contest, are bound to all the duties of neutrality towards both. Whether, therefore, Buenos Ayres be a sovereign state, in the strict sense of the term is quite immaterial for the present purpose. It is sufficient that she is a belligerent entitled to use against her enemy every species of military means. Among these, are the armed and commissioned ships of war, sailing under the public authority of that country, and admitted into the ports of this, with the same privileges as are enjoyed by the national ships of Spain. Being at war, the colonies are belligerents, and as belligerents they are entitled to all the rights of war, and we are bound to all the correspondent duties of the neutrality we profess to maintain. In the case of the *U.S. v. Palmer*[1] this Court lays down the principle that ' when a civil war rages in a foreign nation, one part of which separates itself from the established government, the
p. 329 Courts of the Union must view | such newly constituted government, as it is viewed by the legislative and executive departments of the government of the United States. If the government of the Union remains neutral, but recognizes the existence of a civil war, the Courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.' Why can they not consider these acts of hostility as criminal ? Because war authorizes them, and they are directed by the new government against its enemy ? In other words, because they are lawful : And if they are lawful for one purpose, it is difficult to understand how they can be unlawful for any other. If these acts are authorized by the laws of war, they must produce all the consequences of legal acts. They must vest a good title, *jure belli*, in the prizes taken by authority of the new government from its enemy. And that this is the necessary consequence of the principle is apparent from the words used by the Court in the *Divina Pastora*,[2] which was itself a case of prize, and where the proprietary interest acquired in war came directly in judgment. The Court there says, that ' the government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the Courts of the Union are bound to consider as lawful those acts, which war authorizes, and which the new governments in South America may direct against their enemy.' Here the
p. 330 question was not, whether the | existence of the civil war would excuse from the penalties of piracy those who might act under the authority of the new government, but whether a capture made under that authority was valid by the law of nations. So, also, in the case of the *Estrella*,[3] the validity of the commission was explicitly recognized by the Court, and of course the authority of the government by whom it was issued was admitted.

[1] 3 *Wheat. Rep.* 636. [2] 4 *Wheat. Rep.* 52. [3] 4 *Wheat. Rep.* 298.

In the case now in judgment, it is insisted, on the part of the respondent, that the Court is bound to restore the property to the original Spanish owner, by the true construction of the treaty of 1795. As to the 6th article, it is certainly a very forced interpretation, which makes it imply our duty to restore all Spanish ships and goods which may happen to be found within our territory, although the title may have been changed by a previous capture, *jure belli*, on the high seas. The article is evidently confined to wrongful acts done within our territorial limits. We are 'to endeavour to protect the vessels and effects of Spanish subjects which shall be within the extent of our jurisdiction,' but we are not to restore vessels and effects which have ceased to be Spanish by a lawful capture in war, without the extent of our jurisdiction. Nor have the United States insisted upon such an interpretation of the article as against Spain. We claim indemnity from Spain for condemnation of our vessels and effects by the French consuls in her ports, because to exercise the authority of a prize tribunal, is the highest act of sovereignty, and Spain having permitted it to be done by foreigners within her territory, it is the same thing as if her | own p. 331
national tribunals had inflicted the wrong. The provision in this article is merely declaratory of the pre-existing law of nations, which always considers every sovereign as bound to protect the property of his friends within his territorial jurisdiction, and as responsible for whatever injuries he permitted to be there inflicted upon them. As to the 14th article, it is manifestly confined to privateers, and was not intended to extend to the case of a person entering the public military, or naval service of one of the contracting parties to commit hostilities against the other, and still less to authorize the seizure of a public ship of war or her prizes. This article was evidently intended to abridge a pre-existing right; and that it was a pre-existing right appears from the uniform practice of the whole civilized world. But it is confined in its terms to privateers and letters of marque, and by no fair rule of construction can it be extended to public ships.

Nor is the Court bound to restore, because the claimant, Chaytor, is a citizen of this country, and has violated its laws. Here the learned counsel entered into a minute analysis of the Neutrality Acts, to show that they were merely penal against the party, or the capturing vessel. But here the penalty would begin and end with the person of the captor, for the capturing vessel being a public ship belonging to a foreign state, she could not be forfeited without its being considered an act of reprisals in the nature of war against that state. Once being admitted with her prizes into our ports, she may remain as long as the executive government thinks proper to allow it. | In this respect there is no distinction p. 332
between the public ship herself and her prizes. Here the prize goods

taken by her from the enemies of the state, under whose commission she was cruizing, were landed and deposited in the custom house stores, by the express permission of the government. It is novel doctrine that prize ships and prize goods are no part of the regalian possessions of a sovereign. They may be, and frequently are, absolutely necessary to his safety. They may be the principal means by which he is enabled to carry on the war, and a chief source of his revenue. How is it, then, that they are not equally exempt from the jurisdiction of the local tribunals, with the guns, and spars, and rigging of the ship herself, which may be landed in the same manner for the purpose of making repairs? Are they not brought within the territory under the same permission, express or implied? If an army had a right of passage through a neutral territory, can it be doubted that it would extend to its military chest, and its booty previously acquired? If the fiction of extra-territoriality will protect the ship, which is the principal, why will it not protect the prize goods which are the incidents? The permission to enter may, indeed, be qualified by any condition the neutral state thinks fit to impose; such, for example, as that contained in the law of France, that prize goods which may have been taken from the subjects of the state or its allies should be restored. But this Court has expressly
p. 333 repudiated that principle in the case of | the *Invincible*,[1] and it is for the executive and legislative departments to impose such restrictions as they think fit upon the admission into our ports of armed vessels, public or private, with their prizes. In the case of the *Exchange*, which has been so often referred to, the Court in summing up its opinion says: 'It seems, then, to be a principle of public law, that national ships of war, entering the ports of a friendly power open to their reception, are to be considered as exempted by the consent of that power from its jurisdiction.' The ship herself being exempted from the local jurisdiction, she remains a part of the territory of her own country, and if she brings in with her prize ships, or prize goods, they are to be considered as in the possession of that country. That they are so, is apparent from the established doctrine of this Court, that prize ships or goods, though lying in a neutral territory, may be condemned in a competent Court of the belligerent state, by whose cruizers they were captured. Indeed, the writers on the law of nations expressly state the privilege of bringing in their prizes to be a part of the permission.[2] But how can this be if the immunity does not extend to every thing on board? Here the goods were taken *jure belli*. Whether they are good prize depends upon the adjudication of the captor's Court, which is the only competent tribunal to determine that question. They are in his possession for the
p. 334 purpose of proceeding to adjudication, | even while they are locally within

[1] 1 *Wheat. Rep.* 238. [2] *Vattel, Droit des Gens, l.* 3. *c.* 7.

the neutral territory. Either the condemnation at Buenos Ayres is a sufficient adjudication, or not. If it be so, then the appellant is entitled to the goods under it. If it be not, still he is entitled to the possession of the goods, in order that he may proceed against them in the most regular manner, which he has been hitherto prevented from doing by this very suit.

March 12th.

Mr. Justice STORY delivered the opinion of the Court.

Upon the argument at the bar several questions have arisen, which have been deliberately considered by the Court; and its judgment will now be pronounced. The first in the order, in which we think it most convenient to consider the cause, is, whether the Independencia is in point of fact a public ship, belonging to the government of Buenos Ayres. The history of this vessel, so far as is necessary for the disposal of this point, is briefly this: She was originally built and equipped at Baltimore as a privateer during the late war with Great Britain, and was then rigged as a schooner, and called the Mammoth, and cruized against the enemy. After the peace she was rigged as a brig, and sold by her original owners. In January, 1816, she was loaded with a cargo of munitions of war, by her new owners, (who are inhabitants of Baltimore), and being armed with twelve guns, constituting a part of her original armament, she was despatched from that port, under the command of the claimant, on a voyage, ostensibly to the Northwest Coast, but in reality to Buenos Ayres. | By the written instructions given to the supercargo on this p. 335
voyage, he was authorized to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price. She duly arrived at Buenos Ayres, having exercised no act of hostility, but sailed under the protection of the American flag, during the voyage. At Buenos Ayres the vessel was sold to Captain Chaytor and two other persons; and soon afterwards she assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres; and Captain Chaytor made known these facts to the crew, and asserted that he had become a citizen of Buenos Ayres; and had received a commission to command the vessel as a national ship; and invited the crew to enlist in the service; and the greater part of them accordingly enlisted. From this period, which was in May, 1816, the public functionaries of our own and other foreign governments at that port, considered the vessel as a public ship of war, and such was her avowed character and reputation. No bill of sale of the vessel to the government of Buenos Ayres is produced, and a question has been made principally from this defect in the evidence, whether her character as a public ship is established. It is not understood that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency

of the other proofs in the cause introduced, to corroborate it. The only point is, whether supposing them true, they afford satisfactory evidence of her public character. We are of opinion that they do. In general
p. 336 the commission of a public ship, signed | by the proper authorities of the nation to which she belongs, is complete proof of her national character. A bill of sale is not necessary to be produced. Nor will the Courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the government. If we add to this the corroborative testimony of our own and the British Consul at Buenos Ayres, as well as that of private citizens, to the notoriety of her claim of a public character; and her admission into our own ports as a public ship, with the immunities and privileges belonging to such a ship, with the express approbation of our own government, it does not seem too much to assert,
p. 337 whatever may be the private suspicion of a lurking American | interest, that she must be judicially held to be a public ship of the country whose commission she bears.

There is another objection urged against the admission of this vessel to the privileges and immunities of a public ship, which may as well be disposed of in connexion with the question already considered. It is, that Buenos Ayres has not yet been acknowledged as a sovereign independent government by the executive or legislature of the United States, and, therefore, is not entitled to have her ships of war recognized by our Courts as national ships. We have, in former cases, had occasion to express our opinion on this point. The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot

interfere to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality. All captures made by each must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports under the law of nations must be considered as equally the right of each; and as such must be recognized by our Courts of justice, until Congress shall prescribe a different rule. This is the | doctrine p. 338
heretofore asserted by this Court, and we see no reason to depart from it.

The next question growing out of this record, is whether the property in controversy was captured in violation of our neutrality, so that restitution ought, by the law of nations, to be decreed to the libellants. Two grounds are relied upon to justify restitution: *First*, that the Independencia and Altravida were originally equipped, armed, and manned as vessels of war in our ports; *Secondly*, that there was an illegal augmentation of the force of the Independencia within our ports. Are these grounds, or either of them, sustained by the evidence?

If the cause stood solely upon the testimony of the witnesses who have been examined on behalf of the libellants, we should have great hesitation in admitting the conclusions which have been drawn from it. The witnesses, indeed, speak directly and uniformly either to the point of illegal equipment, or illegal augmentation of force within our ports. But their testimony is much shaken by the manifest contradictions which it involves, and by declarations of facts, the falsity of which was entirely within their knowledge, and has been completely established in proof. It has been said, that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony. That position may be true under circumstances; but it is a doctrine which can be received only under many qualifications, and with great caution. If the circumstances | respecting which the testimony is discordant be immaterial, and p. 339
of such a nature, that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and Courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim *falsus in uno, falsus in omnibus*. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong,

between truth and falsehood? The contradictions in the testimony of the witnesses of the libellants have been exposed at the bar with great force and accuracy; and they are so numerous that, in ordinary cases, no Court of justice could venture to rely on it without danger of being betrayed into the grossest errors. But in a case of the description of that before the Court, where the sovereignty and rights of a foreign belligerent nation are in question, and where the exercise of jurisdiction over captures made under its flag, can be justified only by clear proof of the violation of our neutrality, there are still stronger reasons for
p. 340 abstaining | from interference, if the testimony is clouded with doubt and suspicion. We adhere to the rule which has been already adopted by this Court, that restitution ought not to be decreed upon the ground of capture in violation of our neutrality, unless the fact be established beyond all reasonable doubt.

But the present case does not stand upon this testimony alone. It derives its principal proofs altogether from independent sources, to the consideration of which the attention of the Court will now be directed.

The question as to the original illegal armament and outfit of the Independencia may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage she would have been justly condemnable as good prize, for being engaged in a traffick prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bona fide* sale, (and there is nothing in the evidence before us to contradict it,) there is no pretence to say, that the original outfit on the |
p. 341 voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid.

The more material consideration is as to the augmentation of her force in the United States, at a subsequent period. It appears from the evidence, and, indeed, is admitted by Captain Chaytor, that after the sale in May, 1816, the Independencia sailed for Buenos Ayres under his command, on a cruise against Spain; and after visiting the coast of Spain, she put into Baltimore early in the month of October of the same year, having then on board the greater part of her original crew, among whom were many Americans. On her arrival at Baltimore, she was received as a public ship, and there underwent considerable repairs.

Her bottom was new coppered, some parts of her hull were recaulked, part of the water-ways were replaced, a new head was put on, some new sails and rigging to a small amount, and a new mainyard was obtained, some bolts were driven into the hull, and the mainmast, which had been shivered by lightning, was taken out, reduced in length, and replaced in its former station. In order to make these repairs, her guns, ammunition and cargo were discharged under the inspection of an officer of the customs, and when the repairs were made, the armament was replaced, and a report made by the proper officer to the collector, that there was no addition to her armament. The Independencia left Baltimore in the latter part of December, 1816, having then on board a crew of 112 men ; and about the 8th of January following, she sailed from the Capes of the Chesapeake on the cruise on which | the property in question p. 342
was captured, being accompanied by the Altravida, as a tender, or despatch vessel. It will be necessary, hereafter, to make more particular mention of the Altravida ; but, for the present, the observations of the Court will be confined to the Independencia. It is admitted by the claimant, that during her stay at Baltimore, several persons were enlisted on board the Independencia, and his own witnesses prove that the number was about thirty.

The first observation that occurs on this part of the case is, that here is a clear augmentation of force within our jurisdiction. The excuse offered is, that the persons so enlisted, represented themselves, or were supposed to be, persons in the service of Buenos Ayres. Of this, however, there is not the slightest proof. The enlistment of men being proved, it is incumbent on the claimant to show that they were persons who might lawfully be enlisted ; and as the burden of proof rests on him, the presumption necessarily arising from the absence of such proof is that they were not of that character. It is not a little remarkable that not a single officer of the Independencia has been examined on this occasion. They are the persons who, from their situation, must have been acquainted with the facts ; and the total omission to bring their testimony into the cause can scarcely be accounted for but upon a supposition extremely unfavourable to the innocence of the transaction.

Another observation which is drawn from the predicament of this case is, that if, as the claimant asserts, | the original voyage to Buenos p. 343
Ayres, was a mere commercial adventure, the crew must have been composed principally of Americans or residents in our country. They enlisted at Buenos Ayres on board the Independencia, as officers and seamen for the purposes of warfare, and there is no evidence in the case as to the length of time of their engagements, or of the place where the cruise was to terminate. Why are the documents on this subject, for

documents must exist, in the possession of the claimant; why are they not produced? If the cruise was to terminate at Buenos Ayres, or at a specific period of time, the fact would have a material bearing on the merits of the cause. Yet though the pressure of this point must, at all times, have been forcibly felt, there has not, up to the present moment, been the slightest effort to relieve it from the darkness which thus surrounds it. Under such circumstances, the natural conclusion would seem to be that the crew were to be discharged, and the cruize to terminate at Baltimore. This was their native or adopted home, the place where they first embarked on board the Mammoth, and that to which most of them must be supposed solicitous to return. The conduct of the vessel indicated the same intent. She underwent general repairs, some of which could hardly be deemed of great necessity, and must have been induced by the consideration that Baltimore was a port peculiarly well fitted for naval equipments. During the repairs (a period of two months) the crew were necessarily on shore; and it is scarcely to be supposed
p. 344 that they were held together by | any common bond of attachment, or that they had so far lost the common character of seamen as not to be easily led into some other employment or enterprise, which should yield immediate profit. What proof, indeed, is there that the same crew which came to Baltimore sailed again in the Independencia on her new cruise? It is stated only as hearsay by one or two of the claimant's witnesses, who had no means, and do not pretend to any means of accurate knowledge of the fact. If true, it might have been proved by the officers of the ship, by the muster roll of the crew, and by the shipping articles; and these are wholly withdrawn from the cause, without even an apology for their absence. It would certainly be an unreasonable credulity for the Court, under such circumstances, to believe that the actual augmentation of force was not far greater than what is admitted by the party, and that there was either an innocence of intention or act in the enlistments. The Court is, therefore, driven to the conclusion, that there was an illegal augmentation of the force of the Independencia in our ports, by a substantial increase of her crew; and this renders it wholly unnecessary to enter into an investigation of the question, whether there was not also an illegal increase of her armament.

If any doubt could be entertained as to the Independencia, none can be as to the predicament of the Altravida. This vessel was formerly a privateer, called the Romp, and was condemned for illegal conduct by the District Court of Virginia; and under the decree of the Court,
p. 345 was sold, together with the armament | and munitions of war then on board. She was purchased ostensibly for a Mr. Thomas Taylor, but was immediately transferred to Captain Chaytor. She soon afterwards went to Baltimore, and was attached as a tender to the Independencia,

having no separate commission, but acting under the authority of Captain Chaytor. Part of her armament was mounted, and a crew of about twenty-five men were put on board at Baltimore. She dropped down to the Patuxent a few days before the sailing of the Independencia, and was there joined by the latter, and accompanied her on a cruise in the manner already mentioned. Here, then, is complete evidence from the testimony introduced by the claimant himself of an illegal outfit of the Altravida, and an enlistment of her crew within our waters for the purposes of war. There is no pretence that the crew was transferred to her from the Independencia, for the claimants own witnesses admit that a few only were of this description. The Altravida must be considered as attached to, and constituting a part of the force of the Independencia, and so far as the warlike means of the latter were increased by the purchase, her military force must be deemed to be augmented. Not the slightest evidence is offered of the place or circumstances under which the enlistment of the crew took place. It consisted, according to the strong language of the testimony, of persons of all nations; and it deserves consideration, that throughout this voluminous record, not a scintilla of evidence exists to show that any person on board of either vessel was a | native of Buenos Ayres. We think, then, that the fact of p. 346
illegal augmentation of force, by the equipment of the Altravida, is also completely established in proof.

What, then, are the consequences which the law attaches to such conduct, so far as they respect the property now under adjudication? It is argued on the part of the libellant, that it presents a *casus fœderis* under our treaty with Spain. The sixth and fourteenth articles are relied upon for this purpose. The former is in our judgment exclusively applicable to the protection and defence of Spanish ships within our territorial jurisdiction, and provides for the restitution of them when they have been captured within that jurisdiction. The latter article provides, that no subject of Spain 'shall apply for, or take any commission or letter of marque for arming any ship or ships to act as *privateers*,' against the United States, or their citizens, or their property, from any prince or state with which the United States shall be at war; and that no citizen of the United States 'shall apply for, or take any commission or letters of marque, for arming any ship or ships to act *as privateers*' against the King of Spain, or his subjects, or their property, from any prince or state with which the said king shall be at war. 'And if any person of either nation shall take such commission or letter of marque, he shall be punished as a *pirate*.' In the Spanish counterpart of the treaty, the word 'privateers' in the first clause has the corresponding word 'corsarios;' but in the second clause, no such word is to be found. But it is obvious | that both clauses were intended to receive, and ought p. 347

to receive, the same construction; and the very terms of the article confine the prohibition to commissions, &c. to *privateers*. It is not for this Court to make the construction of the treaty broader than the apparent intent and purport of the language. There may have existed, and probably did exist, reasons of public policy which forbade an extension of the prohibition to public ships of war. It might well be deemed a breach of good faith in a nation to enlist in its own service an acknowledged foreigner, and at the same time subject him by that very act, and its own stipulations, to the penalties of piracy. But it is sufficient for the Court, that the language of the treaty does not include the case of a public ship, and we do not perceive that the apparent intention or spirit of any of its provisions, justifies such an interpolation. The question, then, under the Spanish treaty, may be dismissed without further commentary.

This view of the question renders it unnecessary to consider another which has been discussed at the bar respecting what is denominated the right of expatriation. It is admitted by Captain Chaytor, in the most explicit manner, that during this whole period his wife and family have continued to reside at Baltimore; and so far as this fact goes, it contradicts the supposition of any real change of his own domicil. Assuming, for the purposes of argument, that an American citizen may, independently of any legislative act to this effect, throw off his own
p. 348 allegiance to his native country, as to which we give no | opinion, it is perfectly clear, that this cannot be done without a *bona fide* change of domicil under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for the commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the act. It is unnecessary to go into a farther examination of this doctrine; and it will be sufficient to ascertain its precise nature and limits, when it shall become the leading point of a judgment of the Court.

And here we are met by an argument on behalf of the claimant, that the augmentation of the force of the Independencia within our ports, is not an infraction of the law of nations, or a violation of our neutrality; and that so far as it stands prohibited by our municipal laws the penalties are personal, and do not reach the case of restitution of captures made in the cruize, during which such augmentation has taken place. It has never been held by this Court, that an augmentation of force or illegal outfit affected any captures made after the original cruize was terminated. By analogy to other cases of violations of public law the offence may well be deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruize, the doctrine of this Court has long estab-

lished that such illegal augmentation is a violation of the law of nations, as well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character | of torts, and justifies and requires a restitution to p. 349
the parties who have been injured by such misconduct. It does not lie in the mouth of wrongdoers, to set up a title derived from a violation of our neutrality. The cases in which this doctrine has been recognized and applied, have been cited at the bar, and are so numerous and so uniform, that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported: More especially as no inclination exists on the part of the Court to question the soundness of these decisions. If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than by a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign asserted in his own Courts or the Courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required before cognizance of the wrong could be taken by our Courts. But the practice from the beginning in this class of causes, a period of nearly 30 years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent | for Congress to apply at its pleasure p. 350
the proper remedy.

It is further contended by the claimant, that the doctrine heretofore established has been confined to cases of captures made by privateers; and that it has never been applied to captures by public ships, and in reason and policy ought not to be so applied. The case of the *Cassius*, in 3 *Dall. Rep.* 121, has been supposed at the bar to authorize such an interpretation of the doctrine. That was the case of a motion for a prohibition to the District Court to prohibit it from exercising jurisdiction on a libel filed against the Cassius, a public armed ship of France, to obtain compensation in damages *in rem*, for an asserted illegal capture of another vessel belonging to the libellants on the high seas, and sending her into a French port for adjudication, as prize. The libel alleged that the Cassius was originally equipped and fitted for war in a port of the United States contrary to our laws, and the law of nations. But there was no allegation that she had been originally fitted out by her present commander, or after she became the property of the French government.

The principal question was, whether our Courts could sustain a libel for compensation *in rem* against the *capturing vessel* for an asserted illegal capture as prize on the high seas, when the prize was not brought into our ports, but was carried into a port *infra præsidia* of the captors. The Court granted the prohibition ; but as no reasons were assigned for the judgment, the only ground that can be gathered, is that which is
p. 351 apparent on the face of the writ of prohibition, | where it is distinctly asserted, that the jurisdiction in cases of this nature exclusively belongs to the Courts of the capturing power, and that neither the public ships of a nation, nor the officers of such ships are liable to be arrested to answer for such captures in any neutral Court. The doctrine of that case was fully recognized by this Court in the case of the *Invincible*, (1 *Wheat. R.* 238. ;) and it furnishes a rule for the exemption of a public ship from proceedings *in rem*, in our Courts for illegal captures on the high seas, in violation of our neutrality ; but in no degree exempts her *prizes* in our ports from the ample exercise of our jurisdiction.

Nor is there in reason or in policy any ground for a distinction between captures in violation of our neutrality by public ships, and by privateers. In each case the injury done to our friend is the same ; in each the illegality of the capture is the same ; in each the duty of the neutral is equally strong to assert its own rights, and to preserve its own good faith, and to take from the wrongdoer the property he has unjustly acquired, and reinstate the other party in his title and possession which have been tortiously devested. This very point was directly asserted by this Court in its judgment in the causes of the Invincible. Mr. Justice JOHNSON there said, ' as to the restitution of prizes made in violation of neutrality, there could be no reason suggested for creating a distinction between the national and the private armed vessels of a belligerent. Whilst a neutral yields to other nations the unobstructed exercise of
p. 352 their sovereign or belligerent rights, her own dignity and security | require of her the vindication of her own neutrality, and of her sovereign right to remain the peaceable and impartial spectator of the war. As to her it is immaterial in whom the property of the offending vessel is vested. The commission under which the captors act is the same, and that alone communicates the right of capture, even to a vessel which is national property.' We are satisfied of the correctness of this doctrine, and have no disposition to shake it. In cases of violation of neutral territorial jurisdiction no distinction has ever been made between the capture of public and private armed ships ; and the same reason which governs that, applies with equal force to this case.

An objection of a more important and comprehensive nature has been urged at the bar, and that is, that public ships of war are exempted from the local jurisdiction by the universal assent of nations ; and that

as all property captured by such ships is captured for the sovereign, it is, by parity of reasoning, entitled to the like exemption ; for no sovereign is answerable for his acts to the tribunals of any foreign sovereign.

In the case of the *Exchange*, (7 *Cranch*, 116.) the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory ; for that would be to give him sovereign power beyond the limits of his own empire. | But it stands upon principles p. 353
of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels. To be sure, a foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation. But there is nothing in the law of nations which forbids a foreign sovereign, either on account of the dignity of his station, or the nature of his prerogative, from voluntarily becoming a party to a suit in the tribunals of another country, or from asserting there any personal, or proprietary, or sovereign rights, which may be properly recognized and enforced by such tribunals. It is a mere matter of his own good will and pleasure ; and if he happens to hold a private domain within another territory, it may be that he cannot obtain full redress for any injury to it, except through the instrumentality of its Courts of justice. It may therefore | be justly laid p. 354
down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign, are amenable to the jurisdiction of himself or his Courts : and that the exceptions to this rule are such only as by common usage, and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would indeed be strange, if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon

those who seek an asylum in our ports. We are of opinion that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our Courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are landed from the public ship in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws.

The last question which has been made at the bar, on which it is necessary to pronounce an opinion, is as to the effect of the asserted
p. 355 condemnation of the | property in controversy, at Buenos Ayres, during the pendency of this suit. Assuming, for the purpose of argument, that the condemnation was regularly made, and is duly authenticated, we are of opinion, that it cannot oust the jurisdiction of this Court, after it had once regularly attached itself to the cause. By the seizure and possession of the property, under the process of the District Court, the possession of the captors was devested, and the property was emphatically placed in the custody of the law. It has been since sold, by consent of the parties, under an interlocutory decree of the Court, and the proceeds are deposited in its registry, to abide the final adjudication. Admitting, then, that property may be condemned in the Courts of the captor, while lying in a neutral country, (a doctrine which has been affirmed by this Court,) still it can be so adjudicated only while the possession of the captor remains; for if it be devested, in fact, or by operation of law, that possession is gone which can alone sustain the jurisdiction. *A fortiori*, where the property is already in the custody of a neutral tribunal, and the title is in litigation there, no other foreign Court can, by its adjudication, rightfully take away its jurisdiction, or forestall and defeat its judgment. It would be an attempt to exercise a sovereign authority over the Court having possession of the thing, and take from the nation the right of vindicating its own justice and neutrality.

Upon the whole, it is the opinion of the Court that the decree of the Circuit Court be affirmed, with costs.

The Gran Para.—The Consul General of Portugal, libellant.

(7 Wheaton, 471) 1822.

Prizes made by armed vessels which have violated the statutes for preserving the neutrality of the United States, will be restored if brought into our ports.

This Court has never decided that the offence adheres to the vessel under whatever change of circumstances that may take place, nor that it cannot be deposited at the termination of the cruize, in preparing for which it was committed; but if this termination be merely colourable, and the vessel was originally equipped with the intention of being employed on the cruize, during which the capture was made, the *delictum* is not purged.

APPEAL from the Circuit Court of Maryland.

This was a libel filed in the District Court of Maryland, by the Consul General of Portugal, alleging that a large sum of money in silver and gold coins had been, in the year 1818, taken out of the Portuguese ship Gran Para, then bound on a voyage from Rio Janeiro to Lisbon, by a private armed vessel called the Irresistible, which had been fitted out in the United States, in violation of the neutrality acts; that the said sum of money had been brought within our territorial jurisdiction, and deposited in the Marine Bank of Baltimore; and praying that the same might be restored to the original Portuguese owners. A claim was filed by one Stansbury, as agent for John D. Daniels, master and owner of the Irresistible, stating him to be a citizen of the Oriental Republic, which was at war with Portugal, and that he was cruizing under the flag | and p. 472
commission of that republic at the time the capture was made, as set forth in the libel, and insisting on his title to the money as lawful prize of war. By the proofs taken in the cause it appeared that the capturing vessel was built in the port of Baltimore, in the year 1817, and was, in all respects, constructed for the purposes of war. On the 16th of February, 1818, after being launched, she was purchased by the claimant, Daniels, then a citizen of the United States. A crew of about fifty men were enlisted in Baltimore, and she cleared out for Teneriffe, having in her hold 12 eighteen pound gunnades with their carriages, and a number of small arms, and a quantity of ammunition, entered outwards as cargo. The vessel proceeded directly for Buenos Ayres, where she remained a few weeks, during which time the crew was discharged.

Having obtained a commission from the government at that place to cruize against Spain, a crew was enlisted consisting chiefly of the same persons who had come in the vessel from Baltimore, and she sailed, in June, 1818, on a cruize under the command of the claimant. The next day after she left the port, a commission from General Artigas, as Chief of the Oriental Republic, was produced, under which the claimant declared that he intended to cruize, and that granted by the government

of Buenos Ayres was sent back to that place. During this cruize, several Portuguese vessels were captured, and the money, the restitution of which was prayed for by the libellant, was taken out of them. In Septem-
p. 473 ber, 1818, the Irresistible returned to Baltimore, | and a large sum of money, captured during the cruize, was deposited in the bank.

Decrees were entered in the District and Circuit Courts, restoring the property to the original owners, and the cause was brought by appeal to this Court.

February 20th.

Mr. *Winder*, for the appellant and claimant, made the following points :

1. That the manner in which the Irresistible left the United States, on her voyage to Buenos Ayres, was not in violation of the statutes of Congress, or the neutral obligations of the United States by the law of nations.

2. It was not contrary to the law of nations for the Oriental Republic, finding the Irresistible in the river La Plata, under the circumstances in which she was, to take her into their service as a cruizer against their enemies.

3. That the conduct of Daniels, and any others who went out in her, in entering into the service of the Oriental Republic, was not contrary to the law of nations, nor in violation of the duties of neutrality imposed on the United States by the law of nations.

4. But even if the appellant's counsel should be mistaken in this respect, yet there is no evidence in this cause to show that the money attached was taken from the ship Gran Para, nor that any such ship was captured by the Irresistible.

Mr. *D. Hoffman*, contra, after commenting on the testimony to establish the American ownership, and the illegal outfit at Baltimore,
p. 474 of the privateer, argued, | (1.) that the neutrality and laws of this country having been violated by the captors, this Court will decree restitution on that ground, though the *commission* under which they acted were wholly unimpeachable ; a fact which is not admitted in this case, as the commissions of Artigas stand upon grounds essentially different from those which justify the commissions of Buenos Ayres, the Republic of Colombia, &c.

The law on this subject has become too well settled, and familiar, to justify much reference to, or comment on, authorities. It was at one time supposed that neutral nations were, in all cases, obliged by their amity and neutrality, to rescue the captured and his property from the power of his enemy, who had brought them *infra præsidia* of the neutral country, and to award restitution by a species of *jus*

postliminii. This was certainly, at one time, the doctrine of the English Courts and jurists, and obtains in some countries on the continent of Europe.[1]

The rule, however, of the Courts of this country, has been established to be exactly the reverse. As a general rule, a neutral Court has no such power. The inquiry as to the validity and efficiency of a belligerent capture, is referred to the Courts of the captors; and the restoring power, exercised on various occasions by the Courts of this country, springs from | certain exceptions, which have been engrafted on the general p. 475
rule. This Court will inquire into every seizure on the high seas, for the purpose of ascertaining whether the taking were lawful or piratical; for if there be no commission, the seizure is piracy *de facto* and *de jure*, and renders the captors responsible *civiliter et criminaliter*. If there be a commission which at the time of taking was *amortised*, or abused *animo deprædandi*, they would be responsible certainly *civiliter*, perhaps *criminaliter*. If the commission were granted by an incompetent power, every presumption would be in their favour in a criminal proceeding against them; but they would be civilly responsible before any tribunal administering the *jus gentium*. Every such tribunal, therefore, will inquire, *first*, into the fact of the existence of a commission; *secondly*, the competency of the power granting it; both of which are essential in order to distinguish *capture* from *piracy*, and the commission issued by a state or nation from that which is granted by a few associated persons, or an isolated individual, who have assumed the exercise of sovereign power.[2]

With regard to the *exceptions* to the general rule which refers the question of prize or no prize to the Courts of the captors, and repudiates the right in a neutral to restore the *res capta* to those from whom it has been taken, it is said that there are now only two: *first*, where the capture was made within the | neutral territory;[3] and *secondly*, where p. 476
the capturing vessel was in the whole, or in any part, owned or equipped, or her force in any degree augmented within the dominions of such neutral state, and this by the general principles of international law, independently of all statutory inhibitions of such ownership, equipment, &c.[4] The uniform series of decisions of the American Courts awards restitution to the original owners, of property thus taken, and the facts of the

[1] 2 *Azuni*, 222. 223. 250. 261. *Marten's Priv.* 44. 1 *Molloy*, 58. 60. 66. 76. 87. 100. 6 *Vin. Abr.* 515. 517. 519. 534. 16 *Vin. Abr.* 347. 350. *Beawes, Lex. Mer.* 241. 243. 244. 2 *Brown's Civ. and Adm. Law*, 214. 215.

[2] Talbot v. Janson, 3 *Dall.* 133. The Invincible, 1 *Wheat. Rep.* 258. Rose v. Himely, 4 *Cranch*, 241.

[3] *Grotius, de J. B. ac. P. l.* 3. *c.* 4. *Bynk. Q. J. Pub. l.* 1. *c.* 8. *Vattel, Droit des Gens, l.* 3. *c.* 7. § 132. 5 *Rob.* 15. 373. *Bee's Rep.* 204.

[4] *Pres. Messages, vol.* 1. 21. 24. 27. 36. 42. 47. 48. 56. 61. 62. 72. 73. 78. 82. 87. 95. 9 *Cranch*, 365. 4 *Wheat. Rep.* 310. 311.

present case will be found, it is presumed, much stronger than in most others which have occurred.[1]

2. This Court is competent to restore property to the respondent, by the general principles of maritime and international law, without any reference to the proof that the neutrality and laws of this country have been violated by the captors, but on the sole ground that the taking was not *jure belli*, but wholly without commission; as Artigas does not represent a state or nation competent to grant a commission to war
p. 477 against Portugal. The principles established by | the cases recently decided by this Court, do not impugn the doctrine contended for, as they occurred in the case of commissions granted by such of the South American provinces, as our government, in the opinion of the Court, had recognised to be in a civil war with *Spain*, the mother country, and which commissions only operated against such *parent* state. Our government and this Court having, in no instance whatever, recognised *Artigas* as engaged in a war, even with *Spain*, the mother country, and certainly not with *Portugal*, he is wholly incompetent to issue commissions of prize, as much so as any *other individual* in the Spanish provinces. This Court, therefore, is competent as an *Instance* Court to decree restitution and damages, as in ordinary cases of maritime tort, and to decide (negatively) that the Banda Oriental is not a state or nation invested with the attributes of sovereignty, the former or ancient state of things being presumed to remain *de facto*, as well as *de jure*.

The government of the United States has, in no instance, recognized Artigas as engaged in a civil war with Spain, or in a war of any kind with Portugal. If we refer to the documents recognizing the South American provinces, as engaged in a civil war with Spain, we shall find no mention made of such a war by Artigas, or the Banda Oriental.[2]
p. 478 The general expression, 'South American Provinces,' is | qualified by the express mention of Buenos Ayres and Venezuela. But if the Banda Oriental, as modified by Artigas, might be embraced under such a general recognition of the South American provinces being engaged in a civil war with Spain, still it would be incumbent on the claimant to prove that this country ever was a *province* of Spain: it may have been a *part* of a province: we have no historical or geographical account of the country that is by any means satisfactory; and if Artigas, and his wretched and savage followers be recognized as qualified to wage *war*, then may every township, district, city, village, hamlet, or individual,

[1] *Bee's Rep.* 9. 11. 28. 60. 73. 114. 292. 299. 3 *Dall.* 285. 307. 319. 2 *Peters*, 345. The Alerta, 9 *Cranch.* 359. Divina Pastora, 4 *Wheat. Rep.* 53. The Estrella, 4 *Wheat. Rep.* 298. The Nuestra Senora, *Ib.* 695. Amistad de Rues, 5 *Wheat. Rep.* 385. The Bello Corrunes, 6 *Wheat. Rep.* 152. Nueva Anna, *Ib.* 193. Conception, *Ib.* 335.

[2] 9 *Niles' Regist.* 393. 396. *Let. Sec. State*, 19*th Jan.* 1816. *Mess.* 17*th Nov.* 1818. 4 *Wheat. Rep. Appx.* 23. *Mess.* 17*th Dec.* 1819. *Mess.* 8*th March*, 1822.

claim the same high prerogative. If Artigas, and a few adherents, can segregate themselves from the common cause, and constitute themselves a state or nation competent to wage either a civil or public war, may not every individual in the Spanish provinces claim the same right? Where is the boundary, or clear line of demarcation? By what principle can such a right be regulated, except by requiring that the power claiming the right should be possessed of the elements or constituents of a nation, such as a *fixed domain*, a *national treasury*, a *national force*, a *code* of *laws*,[1] and perhaps, in order to wage a maritime war, sea ports? Nor will Grotius, nor his enlightened commentator, allow a company or horde of men to be a state or nation, although they may observe some kind of government and equity among themselves. | All that we know of p. 479
Artigas and his adherents, proclaims *him* a mere adventurer, and *them* a lawless band to whom he is the sole tie of union. Artigas is mentioned by these documents to be engaged in a contest with Buenos Ayres; but it is no where stated that he is the chief magistrate of a province engaged in a civil war with Spain. The only executive notice of the Banda Oriental, is in the President's message of the 17th November, 1818. On submitting to Congress the documents furnished him by our commissioners, he states, that 'it appears from these communications, that the government of Buenos Ayres declared itself independent, in July, 1816; that the *Banda Oriental*, Entre Rios, and Paraguay, with the city of Santa Fée, all of which *are also independent*, are,' &c.

This, surely is not a recognition of their independence; for the Executive, I presume, has no power to make such recognition; nor is it a recognition of the existence of a civil war between the Banda Oriental and Spain. It will also be observed, that in the late message of the President, 8th March, 1822, no mention whatever is made of the Banda Oriental.

But if it be admitted, *argumenti gratia*, that the Banda Oriental was a South American province, engaged in a civil war with Spain, the mother country, would such a *partial* recognition clothe its chieftain with the power of waging war, against a nation in no way connected with Spain? The sound doctrine, perhaps, is, that a *colony*, though competent to disenthral itself from the despotism of an unnatural | parent, and therefore, p. 480
to wage a civil war, does not thereby become a nation or state, invested with all the high privileges of sovereignty. What would be the consequences of a contrary doctrine? Every minute division of an empire might *per saltum* become a nation, claiming, and asserting, all the prerogatives of free and independent states. These new-fledged, self-constituted, unorganized hordes of people, perhaps only half civilized,

[1] *Sir L. Jenk.* 424. 791. *Bynk. Q. J. Pub. l.* 1. *c.* 17. *Grot. l.* 1. *c.* 3. § 34. *l.* 3. *c.* 3. § 1, 2. *Cic. Phill.* 4. *cap.* 4.

might then well assert their claim to sit in the councils of the great family of nations. They would claim the rights of embassy, of establishing consulates, and of inflicting all the rigours of public wars, as blockades, visitation and search, impressments, seizure, and confiscation of contraband. Such an individual as Artigas, whom no one knows, might, under this doctrine, claim to exercise every belligerent right, and, in waging his triple war, might capture, under the right of blockade, the vessels of every nation presuming to enter Buenos Ayres, Maldonado, Lisbon, or the mouth of the Tagus, though he possessed not a single seaport, or a single vessel of his own. It is, therefore, presumed that every colony recognized as engaged in a civil war for the assertion of its independence, must rigidly restrict itself to the contest with the parent country and its allies; and cannot wage a distinct, and independent war with other nations. If, therefore, the Banda Oriental be regarded as on the same footing with Buenos Ayres, or Venezuela, it cannot war against Portugal: for no alliance is pretended between
p. 481 Spain and Portugal, and if it were | asserted, it must be proved.[1] The contest between Artigas and Portugal originated in a *special* cause, and was prosecuted for a special purpose, viz. the recovery of Monte Video, which had been taken possession of by the Portuguese, because Spanish supremacy having ceased to operate there, the Spaniards had carried on a series of the most vexatious depredations on the adjoining Portuguese provinces, which it became the imperious duty of Portugal to check and terminate. Spain, on the other hand, was engaged in a war with some of its provinces, for general, and very different objects: the conflict, therefore, between Portugal and Artigas, could not by implication, make the former an ally of Spain. If the government recognition be a limited and partial one, (as it certainly is,) so should the *effects* of such recognition be partial. The fact recognized by this government, is, that a *civil* war rages between Spain and her South American provinces. In regard to Buenos Ayres, and Venezuela, this was certainly the fact; but government did not mean, thereby, to acknowledge the *independence* of these provinces. The effect of this recognition is defined by the Court, in *Palmer's* case, and that of the *Divina Pastora*, to be, that the Courts of this country will not regard as *criminal*, those acts of hostility which the province may direct against its enemy; nor will they undertake to judge of the validity of captures made under their commission, unless
p. 482 the maintenance of our laws and neutrality should require it. | The acknowledged competency, therefore, of these provinces, to wage a *civil* war, does not clothe them with any powers beyond the sphere of the necessary operation of this right: they have no right to war with other nations, nor to claim the attributes and powers of sovereign states. If

[1] 1 *Ves.* 283. 292.

this be sound in regard to the known provinces, it must be emphatically so in relation to the Banda Oriental, and its chieftain; who claims not only to war with Spain and her provinces, but with Portugal likewise, which is no way connected with either.

Again; there having been no *express* recognition of the existence of a civil war between Jose Artigas and Spain; can this Court *imply* such recognition from any circumstances? It would seem not. The power to regard a people emerging from barbarism to civilization and government; or from a colonial, to an independent state, is a prerogative exclusively of the government.[1] Courts are bound to regard the ancient state of things as remaining, until there be a recognition by the proper authority, and, therefore, though it be competent for Courts to declare that a people *do not constitute* a state, they cannot affirmatively declare, that they *are* a state. Nor is it competent for this Court to recognize the existence of a *civil* war: this, also, is a government power, and if there be no such express recognition of the fact of a civil war between the Banda Oriental and Spain, this Court will not infer it from the use of a general | expression, such as, 'South American provinces.' The p. 483
doctrine laid down by this Court in Palmer's case,[2] (in which a distinction was taken between an *unqualified* recognition of the independence of a people, and a *partial* recognition resulting from the admission of the existence of a civil war between a colony and the parent state,) is in no degree at variance with the principle established in the previous cases of *Rose* v. *Himely*, and *Gelston* v. *Hoyt*, 'that Courts do not possess the power of first recognizing the national character of a people.' Whether the recognition be unqualified or partial, the government must speak *distinctly;* otherwise, the Courts will regard the ancient state of things; and all acts done on the high seas, under the authority of such *separated* people, will be looked on as wholly unauthorized and null.

3. The claimant, Daniels, is a citizen of the United States, and appears before this Court as a claimant for property procured through means forbidden by the laws of the country, and the duties and obligations of a good citizen. He is an *unworthy* claimant, and as such will not be permitted to claim the result of his own wrongs, and illegal acts. 'A claim,' says Sir William Scott, 'founded on piracy, or any other act, which in the general estimation of mankind is held to be illegal or immoral, might, I presume, be rejected in any Court on *that ground alone;*'[3] and Mr. Justice JOHNSON, in the case of | the Bello Corrunes, p. 484
expresses himself emphatically to the same effect.[4]

4. With respect to there being no proof as to the seizure of the *Gran*

[1] 9 *Ves.* 347. 10 *Ves.* 353. Rose v. Himely, 4 *Cranch*, 272. Gelston v. Hoyt, 3 *Wheat. Rep.* 289. 295. 324.
[2] 3 *Wheat. Rep.* 610.
[3] The Diana, 1 *Dodson*, 95. 100.
[4] 6 *Wheat. Rep.* 172.

Para, from which the money libelled is alleged to have been taken, it is presumed that this is altogether immaterial. The libel states the fact of the seizure of the *Gran Para*, and other Portuguese vessels; the answer expressly admits the taking of the money in controversy, and other money, from *Portuguèse* vessels, and the inquiry is, whether it be the Portuguese property, and if so, whether it were rightfully taken.

Mr. *Winder*, in reply, insisted that the Court would confine its interference to such cases of illegal capture, as would make the United States responsible to the injured foreign country, by the law of nations, or to such acts as are in violation of our statutes of neutrality; restraining their operation to such provisions as are required and justified by the public law. He compared this case to the analogous one of carrying contraband. The neutral nation was not responsible. The building of ships for sale was a lawful branch of commerce, and even if they were armed and equipped for war, they could only be considered as contraband; and though they might be subject to the penalty of confiscation, if taken in their transit to a belligerent, yet, if once incorporated into the mass of his military marine, they could be considered by neutrals in no other light than the rest of his naval force. But even supposing the original |
p. 485 outfit in the ports of the United States to have been illegal, the vessel was not commissioned as a privateer, nor did she attempt to act as one, until her arrival in the river La Plata, when a lawful commission was obtained, and the crew re-enlisted. Even if she had made captures on her outward voyage, the *delictum* would be purged by the termination of that voyage, according to the analogies of the maritime law in other cases. This Court has never yet determined that the original offence is indelible, and that it adheres to the vessel, whatever changes may have taken place, and that it cannot be deposited at the termination of the cruize, in preparing for which, the offence was committed; and as the Irresistible made no captures on her passage from Baltimore to the River La Plata, and even if she had, the offence was deposited at the latter port, the Court cannot connect her subsequent cruize with the transactions at Baltimore, or those which might have happened on her outward voyage. The learned counsel also argued, that the Banda Oriental was a sovereign state *de facto*, which had been acknowledged by the executive government of this country, as one of the parties to the war between Spain and her Colonies, and which was engaged in an incidental contest with Portugal, which gave it the rights of war in respect to that power. He also insisted on such of the points in his argument on a former day, in the case of the *Santissima Trinidad*, as were applicable
p. 486 to the present. But as they will be found reported | at large in that case, it is not deemed necessary to repeat them in this place.

March 13th.

Mr. Chief Justice MARSHALL delivered the opinion of the Court, and after stating the facts, proceeded as follows :

The principle is now firmly settled, that prizes, made by vessels which have violated the acts of Congress, that have been enacted for the preservation of the neutrality of the United States, if brought within their territory, shall be restored. The only question therefore is, does this case come within the principle.

That the Irresistible was purchased, and that she sailed out of the port of Baltimore, armed and manned as a vessel of war, for the purpose of being employed as a cruizer against a nation with whom the United States were at peace, is too clear for controversy. That the arms and ammunition were cleared out as cargo cannot vary the case. Nor is it thought to be material that the men were enlisted in form as for a common mercantile voyage. There is nothing resembling a commercial adventure in any part of the transaction. The vessel was constructed for war, and not for commerce. There was no cargo on board but what was adapted to the purposes of war. The crew was too numerous for a merchantman, and was sufficient for a privateer. These circumstances demonstrate the intent with which the Irresistible sailed out of the port of Baltimore. |

But she was not commissioned as a privateer, nor did she attempt p. 487
to act as one, until she reached the river La Plata, when a commission was obtained, and the crew re-enlisted. This Court has never decided, that the offence adheres to the vessel whatever changes may have taken place, and cannot be deposited at the termination of the cruize in preparing for which it was committed ; and as the Irresistible made no prize on her passage from Baltimore to the River La Plata, it is contended that her offence was deposited there, and that the Court cannot connect her subsequent cruize with the transactions of Baltimore.

If this were to be admitted in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as this enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted in our ports for military operations, need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew, to become perfectly legitimate cruizers, purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired. This would, indeed, be a fraudulent neutrality, disgraceful to our own government, and of which no nation would be the dupe. It is impossible for a moment to disguise the facts, that the arms and ammunition taken on board the Irresistible at Baltimore, were taken for the purpose of being used on a cruize, and that the men

p. 488 there enlisted, though engaged, in form, as for a | commercial voyage, were not so engaged in fact. There was no commercial voyage, and no individual of the crew could believe that there was one. Although there might be no express stipulation to serve on board the Irresistible, after her reaching the La Plata, and obtaining a commission, it must have been completely understood that such was to be the fact. For what other purpose could they have undertaken this voyage. Every thing they saw, every thing that was done, spoke a language too plain to be misunderstood.

The act of June, 1794, c. 296. declares, that 'if any person shall, within the territory or jurisdiction of the United States,' 'hire or retain another person to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince or state as a soldier, or as a mariner, or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending, shall be guilty of a high misdemeanor,' &c.

Now if the crew of the Irresistible were not enlisted in the port of Baltimore, to cruize under the commission afterwards obtained, it cannot, we think, be doubted, but that they were 'hired or retained to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered' into that service. For what other purpose were they hired in the port of Baltimore for the voyage to La Plata?

The third section makes it penal for any person, within any of the
p. 489 waters of the United States, to be | 'knowingly concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruize,' &c.

It is too clear for controversy, that the Irresistible comes within this section of the law also.

The act of 1817, c. 58. adapts the previous laws to the actual situation of the world, by adding to the words, 'of any foreign prince or state,' the words, 'or of any colony, district, or people,' &c. The act of April, 1818, c. 83. re-enacts the acts of 1794, 1797, and 1817, with some additional provisions.

It is, therefore, very clear, that the Irresistible was armed and manned in Baltimore, in violation of the laws and of the neutral obligations of the United States. We do not think that any circumstances took place in the river La Plata, by force of which this taint was removed. To the objection that there is no proof that any part of the money was taken out of a vessel called the 'Gran Para,' it need only be answered, that the allegation of the libel is, that she was called the 'Gran Para, or by some other name.'

Decree affirmed with costs.

The Santa Maria.—The Spanish Consul, libellant.

(7 Wheaton, 490) 1822.

A question of fact respecting the proprietary interest in prize goods, captured by an armed vessel fitted out in violation of the statutes of neutrality of the United States. Restitution to the original Spanish owners decreed.

APPEAL from the Circuit Court of Maryland.

This was a libel filed in the District Court of Maryland, by the Consul of his Catholic Majesty for the port of Baltimore, in behalf of the Spanish owners of certain goods alleged to have been captured on the high seas, and taken out of the Spanish ship Santa Maria, by the privateer Patriota, illegally armed and equipped in the United States. The evidence in the cause established the fact that the capturing vessel was owned by citizens of this country, and that she was armed, equipped, and fitted out, in violation of the laws and treaties of the United States. But there was some contrariety in the testimony as to the identity of the property, which the claimant, Burke, insisted upon his title to hold as a *bona fide* purchaser under a condemnation and sale in some prize tribunal at Galveztown. There was also some evidence tending to show that Burke was a part-owner of the capturing vessel. The District Court dismissed the libel, and ordered the property to be restored to the claimant, but this decree was reversed by the Circuit Court, and the cause was brought by appeal to this Court. |

February 20th. p. 491

Mr. *Winder*, for the appellant, argued upon the facts, in order to show that there was a defect of evidence of proprietary interest in the Spanish subjects, for whom the claim was given, and that there was no proof that the goods in question were taken out of the Santa Maria, or any other Spanish ship. He therefore insisted that even if there was no proof on the part of the claimant and appellant of a lawful condemnation of the goods as prize, he had a right to stand upon his title as an innocent purchaser, until some better title was shown in others.

Mr. *D. Hoffman*, for the respondent, argued, (1.) that the evidence in the cause sufficiently established that the privateer Patriota, which plundered the Santa Maria, was owned and equipped in Baltimore. All captures made under the taint of an illegal outfit, or American ownership, have invariably been declared by this Court to be illegal, and the property taken has been restored to the original owners.[1]

2. All the cases cited were captures *jure belli*, under the sanction of

[1] The Alerta, 9 *Cranch*, 359. The Divina Pastora, 4 *Wheat. Rep.* 52. Estrella, 4 *Wheat. Rep.* 298. Bello Corrunes, 6 *Wheat. Rep.* 152. La Conception, 6 *Wheat. Rep.* 235.

commissions granted by South American provinces acknowledged by our government to be engaged in a civil war with Spain. In these cases, the Court would have left the captors, and the Courts of their country, in full possession of the *res capta*, had there been no American ownership, or equipment of the vessel effecting the seizure.[1] But this will not be
p. 492 the case where there is no *commission* | to legalize the capture. In the absence of a commission, every court administering the *jus gentium*, will regard the taking as *tortious* at least, and, according to circumstance, *piratical*. Every violent dispossession on the high seas is *prima facie* tortious ; and a taking as *prize* does not necessarily render it a capture *jure belli*.[2] It lies upon the claimant in this case to show the commission under which the taking is justified : if this be not shown, the Court, in the exercise of its general powers, will restore the property, unless the claimant can establish his right on some other ground. In this case, no commission is produced ; but,

Burke claims to hold this property rightfully as a *bona fide* purchaser, wholly ignorant of the circumstances stated in the libel. If there were any truth in this defence, in point of fact, it might be well to inquire how far even a *bona fide* purchaser, in this case, could protect himself by such a purchase. It might be urged that the doctrine of *market overt* is unknown to the *jus gentium* ; that it is of peculiar and local origin, known only in England, and never recognized in the Courts in this country ; that the doctrine *a piratis et latronibus capta dominium non mutant*, is the received opinion of the most enlightened civilians and publicists ; that as no right to the spoil vests in them, no right can be *derived* from them ; that even if the doctrine of *market overt* were otherwise applicable, it could not obtain, inasmuch as a condemnation is
p. 493 essential, and this could not be of | *bona piratorum* ;[3] that if the purchase was *bona fide*, the claimant only succeeded to the right of the vendors ; a sale, *ex vi termini*, importing nothing more than a succession of the vendee, in consideration of money, to the rights of the vendor ; and, finally, that the title of the claimant cannot be broader or more extensive than that of the pirates themselves, or those to whom they may have sold the property. But all this inquiry is unnecessary, if the proofs in this cause establish that the claimant was the active and principal owner of the Patriota, which seized and plundered the Santa Maria. On this point the circumstantial evidence comes strongly in support of the positive testimony. But there is, in the answer itself, a singular inconsistency, which throws a dark shade of suspicion over the character of this claim. The claimant first denies *all* knowledge of the capture of

[1] Nuestra Senora, 4 *Wheat. Rep.* 495.
[2] The Two Friends, 1 *Rob.* 283. Hallet v. Novion, 14 *Johns. Rep.* 90.
[3] 2 *Bro. Civ. and Adm. Law*, 55. 461. 462. 2 *Woodes.* 429. 3 *Binn. Rep.* 228. 1 *Johns. Cas.* 471. 1 *Tyl. Rep.* 338.

the Santa Maria, and of every fact stated by the Libellant in relation to the Patriota, but subsequently relies on a purchase of this property, by his agent Novion, in *regular course of trade, after it had been duly condemned!* It was no doubt his intention, at the time of filing his claim, to produce an authenticated record of condemnation, which was subsequently abandoned, no doubt from a knowledge that *Aury's* commission, (the only one he could venture to produce,) was a nullity, and that the tribunals of prize at *Galveztown*, were wholly incompetent to adjudicate,[1] even | if a condemnation of a *competent* court could avail in such case. p. 494

After this conclusive testimony, establishing the falsity of the claim and answer filed by Burke, need it be asked whether he is a *worthy* claimant? He is a citizen of the United States, calling on this Court to confirm to him the possession of goods, taken by a vessel fitted out by him in contravention of our laws, neutrality, and solemn treatics: and this, too, not even under the colour of a commission from any power, acknowledged or unacknowledged.

Mr. *Harper* also argued, upon the same side, on the facts respecting the proprietary interest, and upon the question of law arising from the supposed condemnation at Galveztown. The substance of his argument upon the latter point will be found in the case of the Nereyda, where the same question arose more distinctly, but which was ordered to farther proof, and will be reported in the next volume.

March 14th.

Mr. Justice LIVINGSTON delivered the opinion of the Court, and after stating the case, proceeded as follows:

In a case of so palpable a fitting out and arming in an American port, and proceeding thence directly on a cruize, (whether with or without a commission, is in this case immaterial,) the counsel for the claimant and libellant was right in not attempting to justify the capture. He has therefore confined his endeavours to show the insufficiency of the evidence to establish | any title in the libellant, or in those whom he represents, p. 495 to the merchandize in question.

The allegation of the libel is, that the property was part of the cargo of the Spanish ship Santa Maria, which was captured by the Patriota in the year 1817. The appellant says, there is no adequate proof of this fact. Without laying any stress on the register of this ship, which has been sent from the Havana, and to which the appellant has objected, there are four witnesses, and they are the only witnesses in the cause, whose relation is so uniform and particular as to leave no room to entertain doubt on any part of this transaction.

Three of them were on board of the Patriota, at the time of her

[1] The Nueva Anna, 6 *Wheat. Rep.* 193.

sailing on her illegal cruise. They establish, not only the unlawful armament of this vessel in the port of Baltimore, but the capture of the Santa Maria, and that the sugars libelled are the identical sugars which were taken out of her, and put on board of the schooner Harriet, in which they were brought to Baltimore. The other witness, Causter, although not present at the capture, testifies, in the most positive terms, and of his own knowledge, that the sugars libelled were part of the cargo of the Santa Maria. He speaks so much in detail on the subject, and his means of information were so ample, that it is impossible he should be mistaken. Under these circumstances, and when not a single witness has been examined to throw any doubt on the subject, the Court perceives no reason for disturbing the sentence of the Circuit Court, which is affirmed with costs.

The Arrogante Barcelones.—The Consul General of Spain, claimant.

(7 Wheaton, 496) 1822.

This Court will restore to the former owners property captured in violation of the neutrality of the United States, where it is claimed by the original wrong-doer, though it may have come back to his possession after a regular condemnation as prize.

Quære, How far a condemnation would protect the title of a third person, being a *bona fide* purchaser, without notice, in such a case ?

APPEAL from the Circuit Court of Maryland.

This was a libel filed by the Consul General of his Catholic Majesty, in the District Court of Maryland, against the Spanish ship Arrogante Barcelones, and cargo, praying restitution to the original Spanish owners, upon the ground of the same having been captured on the high seas, in violation of the laws, treaties, and neutral obligations of the United States, and brought within their territorial jurisdiction. A claim was filed by Joseph Almeida, who insisted upon his title as a *bona fide* purchaser, under a capture made by the Buenos Ayres privateer, Louisa, and a regular sentence of condemnation in the Prize Court at Juan Griego, in the Island of Margaritta, within the territory of a co-belligerent. It appeared, by the proofs taken in the cause, that the capturing vessel was a prize to the Buenos Ayrean privateer El Congresso, and was purchased by the claimant, Almeida, armed and equipped by him at
p. 497 Ensenada, and in April, 1818, came to Baltimore | to be refitted. She was there refitted, and sailed from that port in August, 1818, under the command of the claimant, ostensibly bound on a sealing voyage to the North West Coast of America, with a crew of ninety-six men, principally citizens of the United States ; and armed with ten guns and some small

arms. The ship anchored off Patuxent, and there received a considerable addition to the armament. Before the crew left Baltimore they had signed the usual ship's articles for the voyage; but after they had been at sea some days, the claimant produced privateering articles, which he required them to sign. Some of them refused, and were put in irons, and two were put on board another vessel. The crew finally signed the articles, and proceeded to cruize off Lisbon, where, on the 9th of September, 1818, they captured the Spanish ship Arrogante Barcelones and cargo, and proceeded with them to the port of Juan Griego, in the Island of Margaritta, where proceedings were instituted, under which the ship and cargo were condemned in the Court of Admiralty as Spanish property and good prize of war, and purchased by the claimant at public auction. The copy of the sentence produced in evidence was certified by the Notary or Secretary of Marine, and his signature was verified by the certificate of Lino Clemente, deputy of the Republic of Colombia to the United States, but who had not then been received in that capacity by our government.[1] Decrees of restitution to the original Spanish | owners were entered, *pro forma*, in the District and Circuit Courts, and p. 498
the cause was brought by appeal to this Court.

February 22d.

Mr. *Winder*, for the appellant and claimant, argued, (1.) that it was the settled rule of this Court not to interfere in a doubtful case of this description,[2] and that the evidence in the present case was too dubious to justify the Court in depriving the captors of the possession which they had acquired in war. (2.) That even supposing he was mistaken on this point, this was a capture by a lawfully commissioned cruizer of Buenos Ayres, the title under which had been confirmed by a regular condemnation in the Prize Court of Venezuela, an ally of Buenos Ayres in the war against Spain. It may be stated as an universal proposition, which has never yet been doubted or denied, that a sentence of condemnation by a competent Court is conclusive, as to the proprietary interest in the *res capta*, and upon the mere question of prize or no prize: whatever doubts may have been suggested as to the collateral effect of such sentences. And a condemnation in the Court of an ally or co-belligerent is equally competent for this purpose with that of the captor's country itself.[3] This Court, as a neutral tribunal, is | therefore precluded from all p. 499

[1] *Vide* 4 *Wheat. Appx. p.* 49. [2] The Amistad de Rues, 5 *Wheat. Rep.* 385.
[3] *Wheat. on Capt.* 261. 2 *East's Rep.* 473. 2 *Bro. Civ. and Adm. Law*, 257. 281. 'What has been said does not extend to ships *carried into the ports of an ally in the war, and there condemned*, or while the ship is there, condemned in the captor's country; and, therefore, in the present war a sentence of condemnation at Bayonne, of a ship taken by the French and carried into St. Sebastian,* and lying there at the time of the sentence, has been held valid; and this decision agrees with Bynkershoek's opinion, *Qu. Jur. Pub. cap.* 4.

* 2 Robinson, p. 209, case of the Christopher.

inquiry into the previous circumstances under which the capture was made, and whether the capturing vessel had been armed and equipped in violation of our neutrality. There must be some limit to such inquiries, and there is none so fit as a regular sentence of condemnation, which, by the universal law and usage of nations, quiets the title acquired in war. And even if a decree of restitution in the present case would not directly impugn the sentence, it would so far affect the general doctrine of conclusiveness as to disturb the safety of neutral purchasers.

Mr. *D. Hoffman*, contra, insisted, (1.) that there was no sufficient legal evidence of the existence of the condemnation set up in this case. We have a mere dry sentence of the Court of Juan Griego, contained in a few lines, stating that the property is Spanish, and condemned as legal prize. The character of the capturing vessel, by whom commanded, commissioned, or owned and equipped, the authority of the Court to adjudicate on the subject, the nature of the connexion (if any) between Venezuela and Buenos Ayres, or any power by whom the commission may have been granted, do not appear: every ground is withheld which
p. 500 could enlighten this Court, now virtually called upon | to enforce this decree. In a case like the present, the Court will require the most satisfactory information that can be furnished. Where a case is free from suspicion and difficulty of any kind, and when the sentence itself, however concise, necessarily involves the point in discussion before another tribunal, it might be sufficient to produce the *sentence* as evidence of the condemnation relied on; but the Court is pressed, on this occasion, with many necessary inquiries which do not usually occur. If the condemnation is to operate as a conclusive bar against the exercise of the restoring power of this Court, so essential to the maintenance of the laws, treaties, neutrality, and morals of the country, it has a right to be informed whether their violation was ever the subject of inquiry before the Court which pronounced the condemnation: it has a right to ascertain whether there was a commission, and by whom the commission was granted; for if granted by an individual, or a people neither recognized as a sovereign state, nor as engaged in a civil war, the condemnation would, on these grounds alone, be wholly inoperative. In such a case the Court will require the entire prize proceedings to be exhibited; but if not, then at least the libel, in addition to the sentence. Here is neither the libel nor an abstract of proof, and the sentence itself is uncommonly bald. The rule on this subject *formerly* was, that the *entire proceedings* should be set forth: now, however, if the libel and sentence are satisfactory, the Court dispenses with any thing further.[1]
p. 501 The libel, it would | appear, is essential: In *Fernandis* v. *Da Casta*,[2] Lord Mansfield dispensed with the libel, only because the plaintiff had,

[1] Mar. Ins. Co. v. Hodgson, 6 *Cranch*, 207. 220. [2] *Park on Ins.* 177. 178.

by an unequivocal act of his own, made it unnecessary to be exhibited. So, also, in the case of *Beake* v. *Tyrrel*,[1] the necessity of furnishing the Court with the material grounds of the prize proceedings, is strongly urged by Lord Chief Justice Holt. If we advert to the general principles of the common law on this subject, we shall find it an established principle, that wherever a record is relied on, *all that concerns the matter in question* must be produced. The authorities cited are pointed to this effect.[2] No case can well be imagined in which the necessity of showing the grounds and extent of the proceeding more strongly applies than in the present: for it does not appear that Almeida had any commission; and if this be the fact, no condemnation would avail, were it ever so well authenticated.[3]

2. But were the condemnation satisfactorily proved, it is contended that it was pronounced by a Court wholly incompetent to adjudicate on the case; that the whole proceeding was *coram non judice;* and that it appertains to all Courts to inquire into the *jurisdiction* of another Court, whose judgments or decrees are relied on. It is presumed that under the *jus gentium* an operative sentence of condemnation must be pronounced: either, *first*, by a Court of the | captor sitting in the country p. 502
of the captor; or, *secondly*, by a Court of the captor, held in the country of an ally or co-belligerent of the captor; but that the Courts of the ally or co-belligerent are wholly incompetent to hold plea of captures made by any one but themselves. The question is entirely new; and it is believed to be so only because it was never before attempted by the Courts of an ally to pass sentence on captures made by their associates in war. That allies and co-belligerents can co-operate *judicially* as well as in a belligerent manner, is a position not to be found in the works or opinions of any writer. Condemnations in the *port* of an ally or co-belligerent are frequent; but no case can be produced of a condemnation in the *Court* of an ally. No elementary writer mentions this exercise of judicial power of an ally. Dr. *Brown* [4] has been evidently misapprehended by the appellant's counsel. That sensible, though hasty, and sometimes inaccurate writer, has not expressed himself, in the passages cited, as clearly as he might have done; but still he does not speak of the *Courts* of an ally condemning property taken by a companion in arms. He speaks of ships carried into the ports of an ally, and *there condemned;* but he does not state by *whom* condemned. It is, therefore, but justice to him to infer that he meant *a Court of the captors* established in the territory of the ally in the war; and that this, and nothing else, is his meaning, is obvious from the authorities which he cites. All the cases in support of the condemnation now in

[1] *Comber.* 120.
[2] 3 *Inst.* 173. *Trial per Pais.* 166. 2 *Bac. Abr. Evid. F. p.* 611. 613.
[3] 2 *Bro. Civ. Law*, 55. [4] 2 *Bro. Civ. Law*, 215. 257. 281.

p. 503 judgment, will be found, on examination, to be decrees | pronounced by Courts of the captors, sitting in the country of the ally or co-belligerent, and therefore confirmatory of our position. The very silence of the writers on the law of the admiralty as to this subject, and the absence of all judicial authority, argues the soundness of the doctrine contended for. The case of the *Harmony*[1] was a condemnation of a British vessel, by the French commissary of marine, sitting in the country of an ally in the war; and the cases of the *Adelaide*, and the *Betsey Kruger*, were under similar circumstances. The *Cosmopolite*[2] presents a condemnation by the *French Consul*, in a Spanish port, Spain then being a co-belligerent with France; and though the *res capta* was American property, the principle is the same. So likewise in the case of *Oddy* v. *Boville*,[3] mainly relied on by the appellant's counsel, we find the condemnation to have been pronounced by a *French Court*, sitting in Spain, then an ally of France, in a war against Great Britain. In fine, all the cases of condemnation in the country of a co-belligerent, are by courts of the captor sitting within the dominions of the ally. But it is not alone on the absence of authority, sanctioning prize proceedings in the courts of the ally, that the doctrine now contended for reposes. Every principle and analogy of the law on the subject are at variance with the exercise of such a power. The principles which introduced condemnation as an evidence of transmutation of property under the laws of war, in lieu of the doctrine
p. 504 of *deductio infra* | *præsidia*, pernoctation, &c. evince the impropriety of transferring the investigation *ad aliud examen*. A judicial inquiry into the regularity of prize proceedings is important to the world at large. The capturing nation has an interest in knowing that its prize ordinances are strictly adhered to, and the Courts of that nation are the most competent to inquire into this, and to enforce their observance. The nation of the captured belligerent has also some rights in respect to the things taken: as war is a contest by force to compel the party in the wrong to make retribution for some injury, the principals in the war have an account to settle, and they are reciprocally responsible for the justice and regularity of all hostile acts. No tribunals, therefore, but those of the capturing belligerent, ought to inquire into the validity of captures. Neutrals, likewise, are interested that the regularity and validity of seizures made from them should be passed on by the tribunals of that belligerent by whom the taking was effected. A contrary doctrine might deprive them of the benefit of that responsibility to which captors should ever be liable. If the ally passes sentence, it is probable the neutral would be referred to the capturing nation for any satisfaction the case of an illegal capture might demand; and if application were then made to that nation, the neutral might be referred back to the ally who

[1] 2 *Rob. Adm. Rep.* 174. *note.* [2] 3 *Rob.* 268. [3] 2 *East's Rep.* 474.

pronounced the sentence. In theory, therefore, and practice, there appears to be a moral fitness in the rule which would restrict the power of condemnation to the tribunals of that belligerent by whom the property had been actually taken. The *country* | then, of an ally, may p. 505
be subservient to this purpose, but not the *Courts*, unless where the captures are made by the allies or co-belligerents themselves.

In addition to the objections to the mode of authenticating the condemnation, and the competency of the tribunal pronouncing it, may we not ask for some proof of an alliance or association in arms between Venezuela, the alleged ally, and the power, whatever that be, under which the claimant pretends to have acted? Even the sentence itself affords no light on this subject, and if it did, the proof should be by matter *aliunde*. As the condemnation is silent as to the power granting the commission, and no commission has been produced, this Court has no evidence that the condemnation was pronounced even by the *Court of an ally;* for the Court may justly infer that there was no commission, and if the inference be not made, but it should turn out that Almeida acted under an *Artigas* commission, the Court might then be of opinion that no alliance could be formed with the Banda Oriental, or its chieftain, Artigas, as none are capable of maintaining the relation of an ally who cannot be a sole belligerent. Hence, then, the necessity of proving the alliance, and thus furnishing an additional reason for requiring the production of something more than a naked sentence of condemnation.

4. But should all these objections prove unfounded, we then resort to the ground, that a condemnation by a Court of competent jurisdiction does not deprive this Court of the power it otherwise would possess of restoring this property, the exercise of this | power being essential to p. 506
the maintenance of our laws and neutrality.

That this sentence is wholly inoperative, as respects the restoring power of this Court, appears to be manifest from a variety of considerations.

As the avowed object of this condemnation was to close the judicial eye, and paralize the judicial arm, of this tribunal, it will be proper to inquire into the object and extent of the prize proceeding in the Vice Admiralty of Juan Griego, and the jurisdiction and power now required to be exercised by this Court. We contend, *first*, that this Court, in vindication of the violated laws of the land, will, if necessary, wholly disregard this condemnation; but, *secondly*, that restitution may be decreed without impugning, in any degree, the operation of this sentence, or the general doctrine of the conclusiveness of admiralty decrees. This is not a *petitory* but a *possessory* suit. The *title* to the property is no way involved in this proceeding. There is but one inquiry: Has the claimant acquired the *possession* of this property by means unlawful, as regards

this country ? if so, that possession will be restored to those from whom it has been wrested by the instrumentality of our citizens. The possession will be placed *in statu quo*, without any reference to the title which may otherwise have been acquired by the capture and condemnation. If this can hereafter avail the claimant any thing, it is well ; this Court only claims the power of undoing that which has been done in breach
p. 507 of the laws, and only so far as to place both | parties, in regard to the possession, in their former condition.

Were the Court deprived of this wholesome power, our citizens and foreigners might violate our laws and most solemn treaties with complete effect. The fruits of their illegal captures, though brought here, and in the control of our tribunals, might be at once snatched from it by the production of a condemnation decreed by the very power, and in favour of the very persons, by whom our laws have been infracted. If, during this investigation, the captors, by the pretended necessity of sending a commission abroad, should procrastinate the adjudication, sufficient time would be gained for the production of a well concocted condemnation, which would never fail to make its appearance in due time ; and thus the violators of our laws would uniformly be confirmed in the possession of the fruits of their own wrong.

In the case of the *Anne*[1] it was decided by this Court, that a capture made within neutral territory, is nevertheless valid, as between the belligerents, though it be a nullity as respects the neutral whose territory has been violated. If England, then, and France be at war, and an English privateer captures a French vessel, in the port of Philadelphia, and forthwith proceeds with the prize to sea, carries her *infra præsidia capientium*, where she is condemned, and is then brought back to the
p. 508 port of Philadelphia ; what would probably be the language | of this Court, when about to restore the prize, if a condemnation were presented with a view of closing all inquiry as to the violation of our territory ? We apprehend it would be to this effect. In regard to France, your *enemy*, the capture is rightful ; your condemnation pronounces it such ; but in the present inquiry a *third* party is interested. Your possession of this vessel was gained by an abuse of our asylum, and an infraction of our territorial jurisdiction : as we have now the possession of the *corpus*, we restore it to those from whom you have, as to this country, illegally taken it. If such would be the language of this Court, in the case of a gross violation of our territory, I apprehend the same reply will be given to Almeida, who has not only violated all the laws enacted for the preservation of our neutrality, but has, also, grossly abused the asylum accorded to the privateers of the South American provinces. If these vessels, in the use of that asylum, completely equip themselves

[1] 3 *Wheat. Rep.* 435.

with our arms, ammunition, and men, and all is to be rendered valid, or at least inscrutable, by a formal condemnation, all legislation on the subject of neutrality is but public and solemn mockery.

If this condemnation be a conclusive bar against all inquiry as to the violation of our laws, the competency of the power granting the commission, the competency of the person receiving the commission, &c. it is manifest that Venezuela, Buenos Ayres, or any of these new formed sovereignties, may compel | us, through the instrumentality of p. 509
a condemnation, to accord to them the rights of sovereignty to every extent. In such case, captures made under the commission of Aury, or Artigas, would be equally operative with those granted by powers acknowledged to be independent, or engaged in a civil war, and the doctrine of *Rose* v. *Himely*, and the distinction taken in *Palmer's case*, and that of the *Estrella*, would be of no avail. Nay, even in the case of seizures clearly piratical, the 6th and 14th articles of our treaty with Spain would be effectually annulled.

Again; all inquiry into the *fact* of the violation of our laws, and its civil as well as penal consequences, belongs exclusively to the tribunals of this country. The Courts of other nations have no right to pronounce a binding judgment as to the validity or invalidity of any act against our civil, political, or criminal laws: the right to vindicate our own laws is essential and inherent: it is a sovereign right, which we have not parted with to the tribunals of other nations. If the decrees or judgments of those tribunals come in collision with our laws, the Courts of this country must pursue their even way, and enforce those laws, without any reference either to the laws or judgments of a foreign state. Passive obedience to the decisions of foreign tribunals has been sufficiently inculcated; but no attempt has ever been made of so exceptionable a character as this: to require this Court not only to yield to the demands of foreign violators of our laws and sovereignty, but also to the insolent requisitions of our own criminal citizens.[1] | To give force to this con- p. 510
demnation is, in fact, to call on this Court to enforce the decree of a foreign Court. A Court, thus called on, always claims the privilege of examining into the jurisdiction of the Court pronouncing the decree, the regularity of its judicial proceedings, and the *intended* extent of its operation.

It cannot be denied, that if a privateer, or even a public vessel of war, of a foreign power, be fitted out in our ports, her commission can protect neither her nor her prizes from the sanctions of our law. Why then should a *condemnation*, which is but the exercise of another species of sovereign power, place the property in a state of absolute immunity? The position taken on the other side, that decrees of a Court of competent

[1] 2 *Azuni*, 252. 1 *H. Bl.* 123. 2 *H. Bl.* 410.

jurisdiction are *always* binding, and exclude *all* inquiry, is far from sound. The general doctrine is well known, but its extent and its exceptions are equally well known.

Secondly: But this Court may decree restitution, without in any degree impugning the doctrine of the conclusiveness of admiralty sentences.

If the postulate be allowed, that the restoring power of this Court rest exclusively on the ground of violated neutrality, then the prize Court had no right to, and never did, in fact, institute any inquiry relative to the illegality of the equipment, in reference to our laws; that is an inquiry competent for this Court solely. There is another inquiry, competent solely for the Courts of the captors, viz. the fact of the capture, and its conformity to prize regulations and the *jus belli*.
p. 511 | These are distinct rights, in the exercise of which neither tribunal is called on to pronounce on any matter not essential to be proved in order to justify a decision. The taking was rightful, in regard to the belligerents, though our laws were violated, and its restitution by this tribunal will be equally so, though the seizure be valid *qua* prize. In this point of view, there is no collision between the two tribunals; the decree of each stands, *valeat quantum valere potest.* No judgment or decree establishes any thing beyond what was necessarily proved in order to arrive at the decision. The sentence, at most, proves nothing but its own correctness in regard to the mere question of prize.[1] All the cases, where condemnations are relied on, have a qualification to this extent. The sentence in this case pronounces that the property was Spanish, and is condemned as good prize. It does not state, either affirmatively or negatively, one word about the equipment of the privateer; and it cannot, therefore, be even *prima facie* evidence that the privateer had proceeded legally in regard to the whole world. Where a vessel is captured by a belligerent, for unneutral conduct, a condemnation would be conclusive; she was condemned on this sole ground, and she could not be restored by the Courts of the neutral nation, without falsifying the very fact on which the capture and condemnation proceeded. But here the possession will be restored to the Spanish owners, not *qua* prize, but simply on the ground that the use of our neutral means in making the
p. 512 | capture, was a matter in which the prize Court of Juan Griego had no concern.

As a capture in violation of neutral territory is still valid, in regard to the contending parties, the capture, in a belligerent Court, would be *omni exceptione major.* Spain, in the present case, would in vain have set up the violation of our laws as a defence, and the United States had

[1] Maley v. Shattuck, 3 *Cranch* 458. 488. The Mary, 9 *Cranch*, 126. 142. 1 *Campb. N. P. Cas.* 419. 12 *Mass. Rep.* 291. 2 *Bro. Civ. and Adm. Law.* 121.

no *persona standi in judicio*. A suggestion of violated neutrality, on behalf of this country, would not have been regarded.

Adverting, for a moment, to the grounds on which the doctrine of conclusiveness is said to rest, we shall find that none of them would be impeached by the restoration of this property. They are said to be three: comity, notice to all the world, and the co-equality of nations. As to the doctrine of comity, it is founded on the supposition of the utmost good faith, and there must be a perfect reciprocity in order to support it. Is it not too much to require of any nation, on the ground of comity, to permit foreign powers to confederate with the worst class of our people, in insulting and trampling on our solemn treaties, neutral obligations, and explicit laws of public policy?

But it is supposed to be a second ground of this doctrine of conclusiveness, that the whole world have notice, and are parties to the proceedings in a prize Court, they being *in rem*. This, if true in fact, only applies to those who have a title or interest in the *res ipsa*, and not to those who have such a collateral, incidental, or potential right as that of the United | States. But the notice is itself a mere fiction.[1] The p. 513
United States had no *persona standi* in that Court; and if they had, it would have been impossible to assert it, as the libel, condemnation, sale, and arrival of the prize in this country, were nearly cotemporaneous. It is the nature of fictions to work justice, not palpable injustice: this Court, therefore, will not suffer itself to be ousted of its rights by a forced application of such a fiction.

The last ground on which condemnations have acquired their power, is the admitted co-equality of all nations. This, perhaps, is the true principle. Admitting that the recognized competency to wage a civil war would clothe these provinces with every attribute of sovereignty, the reply is, that the Courts of no nation are competent to render this condemnation binding to the extent contended for: this would be at war with the very principle; we should become *inferior*. The *deductio infra præsidia* does not clothe this Court with any power; its jurisdiction originates in its right to maintain our neutral duties, and extends only so far as is required for that maintenance; no power on earth can deprive us of this right. If the sentence of any Court be extended thus far, we may say, with Lord KENYON, 'it may be throwing a veil over decisions founded on Algerine, or worse than Algerine principles; and if such sentences are to protect their own injustice, redress would be sought in vain:' and it may be added, that the rights of this country, and those of the | most vital nature, would be prostrated without remedy. If, p. 514
then, the prize Court of Venezuela have powers co-ordinate with this, we should not, however, by asking restoration, impute to this condem-

[1] 3 *Dall.* 91. 9 *Cranch*, 144.

nation a legal infirmity, but to the capture a vice antecedent and paramount to the decree, and not cognizable by that tribunal.

Were the doctrine of conclusiveness permitted to rest on its original principles, we should not be inclined to quarrel with it; but where it is extended beyond its known and salutary operation, we cannot regard it but with a jealous eye. If it be invoked by a purchaser under the decree, or to falsify a warranty of neutrality, there are then special reasons of policy, convenience, and comity, which sustain it. These special grounds are satisfactorily explained in the case of *Croudson* v. *Leonard*;[1] but it will be seen that none of the three grounds there set forth would be impugned by a restitution of this property: for *first*, the question of prize is not before this Court; *secondly*, the present inquiry is not in a common law court, but before a tribunal of the law of nations, and every way competent to make the necessary investigation; and *thirdly*, the decision of a Court of co-ordinate jurisdiction is not re-examined.

But it has been urged, that a restitution of this property to the Spanish owner, though it might not directly impugn the condemnation, would be so far opening admiralty decrees as to disturb the safety of neutral purchasers generally, and that this would be contrary to the
p. 515 policy of nations. The answer to this | is, that the purchaser under the decree of any Court does not necessarily obtain an unimpeachable title. He must take the property *cum onere*; the paramount vices in the title remain; he does not purchase under a general, but under a special warranty. The title gained by the capture, remains; it was illegal in its origin, and, as to the offended power, can never be rehabilitated.[2]

5. Lastly, the proof in the present case is positive that this vessel and cargo were captured by the claimant, for himself and his associates. The condemnation enures to his benefit; the alleged purchase by him was nominal; and, if it were otherwise, he gained his title or possession by a wrong, and no act of his can purge the wrong. Here we may apply the rule of the civilians: *that no one can change the cause of his own possession*. On this principle is it, in part, that executors, guardians, and all who stand in the relation of trustees, are, (as a general rule,) incompetent to purchase the trust estate. Almeida's possession was gained by a wrong; he cannot change the character of that possession; he cannot, by his own act, give himself a better title. A defective title may indeed be rendered good by the purchase of outstanding good titles; but here is no outstanding interest in the subject matter but in the United States. The condemnation then could only corroborate the title which he had gained, and could not clothe him with a better one.

[1] 4 *Cranch*, 434.
[2] Moodie v. The Betty Cathcart, *Bee's Rep.* 299.

Mr. *Harper* also argued on the same side; but | as the whole of his p. 516
argument upon the conclusiveness of the foreign sentence will be found reported at large, in the case of the *Nereyda*, in order to avoid a repetition, it is thought expedient to refer the reader to that case, which involved the same question.

Mr. *Winder*, in reply, denied the authority of the supposed rule that a decree or sentence of a Court of Admiralty cannot be given in evidence, without producing the libel, or other proceedings. There can be no necessity for producing the libel, if the sentence itself shows what the libel would show: and in this case the decree sets forth every fact which would appear on the face of the libel, or which is material to establish the conclusiveness of the proceedings. The decree accompanies the possession of the vessel, the essential muniment of her title. This Court has never asserted a right to look beyond the sentence of condemnation. It has always admitted its conclusiveness, even as to collateral effects. But even if the sentence be conclusive as to the question of prize only, the right of the original owner is completely devested. And even admitting this to be a possessory action, yet the right of possession depends on the right of property, otherwise any stranger might claim. As to the competency of the tribunal; the fact of the connection between the different Spanish provinces in the present war is notorious, and Courts of justice will always take notice of such facts. Indeed, the President, in his different official communications to Congress, has alluded to their being engaged | in a common contest against the mother p. 517
country. Why then should they not lend each other the aid of their tribunals to pronounce condemnations, as well as of their ports to fit out the armaments with which the captures of Spanish property are made? If, according to the original practice of nations, a carrying *infra præsidia* were to consummate the title, would it not be sufficient to carry the prize within the territory of an ally, or co-belligerent? If one co-belligerent can consent to a foreign tribunal sitting within its territory, and condemning prizes made by the cruizers of its ally, why may not the ally permit its captures to be adjudged in the Courts of its co-belligerent? But at all events, Venezuela was herself engaged in war against Spain, and this was the property of her enemy brought into her territory. She had a right to condemn it in her Courts, and did condemn it so as to make it a part of the mass of national property. There is no positive authority which denies the authority of the Courts of a belligerent, to condemn prizes captured by its co-belligerent; and in the absence of any case to the contrary, it is sufficient that no reason of principle or public policy exists to prevent it. The learned counsel also referred to the Resolution of Congress during the revolutionary war, authorizing their Courts to condemn prizes captured by French

cruizers, to show that the opinion and practice of nations had authorized similar proceedings.[1] |

p. 518 *March 14th.*

Mr. Justice JOHNSON delivered the opinion of the Court.

The offence proved upon Almeida in this case is one of a very aggravated nature. He not only violated the neutrality of this government, but effected his purpose, by practising a flagrant fraud, either upon his crew, or upon the revenue officers of the port of Baltimore; or perhaps partially upon both. Every thing in the case proves that the sealing voyage round Cape Horn was a mere pretext; and if it be true that the crew were kidnapped under that pretext, and forced into belligerent service after getting to sea, it is a remarkable instance of bold and successful imposition. But who can believe it? The truth unquestionably is, that the crew, with perhaps the exception of the few who were put in irons, understood perfectly the nature of the enterprize they were embarking in, and were deceived into the belief that their affected ignorance, or the impudence of the fraud, would screen them from the penalties of the laws which forbade their entering into belligerent service.

It cannot, then, be questioned that Almeida now appears before us in the character of a flagrant offender against the laws and neutral obligations of this country. And there is no shadow of a ground for hesitating to apply to this case the established rule of this Court, in cases of illegal outfit, unless it be the condemnation of this vessel and cargo in the Court of Margaritta.

This Court will, for the present, waive all expression of its opinion on the questions raised upon the validity of that condemnation, or the
p. 519 sufficiency of the | document produced to prove it. We will put our decision upon a single, and independent ground, that the view of this Court, with regard to all such cases, may henceforth be distinctly understood.

We find the captured property in the hands of the offender, and hold it to be immaterial through what circuity of changes it has come back to him. It is not for him to claim a right springing out of his own wrong. In the hands of a third person, a valid sentence of condemnation, properly authenticated, would present a very different view of the subject. The offender's touch here restores the taint from which the condemnation may have purified the prize. Although a purchaser without notice, may, in many cases, hold his purchase free from an interest with which it was chargeable in the hands of the vendor, yet it cannot return into the hands of that vendor, without reviving the

[1] 5 *Wheat. Rep. Appx.* 123.

original lien. Nor will Courts of justice ever yield the *locus standi in judicio* to the suitor, who is compelled to trace his title through his own criminal acts

Decree affirmed.

The Monte Allegre and the Rainha de los Anjos.—The Portuguese Consul General, libellant.

(7 Wheaton, 520) 1822.

A question of fact upon the *bona fides* of an alleged sale of Portuguese ships, and their cargoes, which had been captured in violation of our neutrality. Restitution to the original owners decreed.

March 14th.

APPEAL from the Circuit Court of Maryland.

These causes were argued by Mr. *Winder*, for the appellant and claimant, and by Mr. *D. Hoffman*, for the respondent and libellant; but as the same points were insisted on as in the preceding cases of the *Gran Para* and the *Arrogante Barcelones*, 7 *Wheaton*, 471. 496., it is not thought necessary to report the argument of counsel in the present case. The facts are stated in the opinion of the Court.

March 18th.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

The Monte Allegre was captured by the private armed vessel called La Fortuna, cruising at the time under a commission from the chief of the Oriental Republic. She was completely fitted out, equipped, and manned, in Baltimore, from which port she sailed on her first cruize, in December, 1816; owned and commanded by citizens of the United States; but commissioned by the government of Buenos Ayres. She sailed again on her second cruize, in August, | 1817, from the port of p. 521
Baltimore. This cruize terminated at Buenos Ayres, where she was in part dismantled, some of her rigging and arms being deposited in a store ship which lay near her. The crew also were discharged. After lying in port four or five weeks, she sailed on her third cruize, having the same armament with which she sailed from Baltimore, and about twenty or thirty of the same crew. Her commander was changed, but was

[1] In the case of the *Nereyda*, which was argued at the present term, the Court was of opinion, that in cases where a condemnation is relied on, the libel as well as the sentence ought to be produced, in order that the Court might judicially see that the foreign tribunal had jurisdiction, and what was the ground of application for condemnation, and the parties by whom it was sought. The Court also thought that the claimant ought to show by competent evidence that he was a *bonâ fide* purchaser of the property for a valuable consideration; and from the defects of the proofs on both points, the cause was ordered to farther proof. It has therefore been thought fit to omit a report of the case, until its final decision.

still a citizen of the United States; and she sailed under a commission from the Oriental Republic. On this cruize, the Monte Allegre was taken, and sent into the port of Baltimore, where she was libelled by the Consul General of Portugal. She was claimed by William Foster, the prize master, in behalf of the Oriental Republic, who alleged, that while she lay in the port of Buenos Ayres, she was purchased by the government of the Banda Oriental.

The reality of this sale constitutes the only question which can arise in this case.

The testimony in support of it is found in the depositions of James Brown, James Williams, William Towson, and Alexander Towson. They mention the partial dismantling of the vessel, and speak of a report that she was sold, but they give no positive information on the subject, nor did they even hear to whom the sale was made. This testimony would weigh very little, were it even uncontradicted. But the regular transmission of her prizes to Baltimore, her returning to that port, at the termination of her cruize, the depositions taken to show that the original proprietors had not parted with their interest, are proofs of a continuing American ownership, which are entirely conclusive. There can, then, be no doubt but that the captures made by the Fortuna are in violation of the laws of the United States, enacted for the preservation of our neutrality, and that they ought to be restored when brought within our territory.

The Rainha de los Anjos was a Portuguese vessel, captured by the La Fortuna, in the same cruize in which she captured the Monte Allegre. The cases are, in all material respects, the same.

Sentences affirmed with costs.

La Nereyda.—The Spanish Consul, libellant.

(8 Wheaton, 108) 1823.

Quære, Whether a regular sentence of condemnation in a Court of the captor, or his ally, the captured property having been carried *infra præsidia*, will preclude the Courts of this country from restoring it to the original owners, where the capture was made in violation of our laws, treaties, and neutral obligations?

Whoever claims under such a condemnation, must show, that he is a *bonæ fidei* purchaser for a valuable consideration, unaffected with any participation in the violation of our neutrality by the captors.

Whoever sets up a title under any condemnation, as prize, is bound to produce the libel, or other equivalent proceeding, under which the condemnation was pronounced, as well as the sentence of condemnation itself.

Where an order for farther proof is made, and the party disobeys, or neglects to comply with its injunctions, Courts of prize generally consider such disobedience, or neglect, as fatal to his claim.

Upon such an order, it is almost the invariable practice for the claimant (besides other testimony) to make proof by his own oath of his proprietary interest, and to explain the other circumstances of the | transaction; and the absence p. 109
of such proof and explanation always leads to considerable doubts.

Quære, Whether a condemnation *in the Court of an ally*, of property carried into his ports by a co-belligerent, is valid ?

APPEAL from the Circuit Court of Maryland.

This was an allegation filed by the Spanish consul against the brig Nereyda, a public vessel of war belonging to the king of Spain, stating, that the vessel had been captured by the privateer Irresistible, John O. Daniels, master, in violation of the laws, treaties, and neutral obligations of the United States. The claim given in by Henry Child, as agent in behalf of the claimant, Antonio Julio Francesche, set up a title in him acquired under a sale in pursuance of a sentence of condemnation, as prize to the captors, pronounced by the Vice Admiralty Court at Juan Griego, in the island of Margaritta, in Venezuela. The capture was made under an alleged commission from Jose Artegas, chief of the Oriental Republic of Rio de la Plata, and the prize carried into Juan Griego, as to a port of an ally in the war, for adjudication. The capturing vessel was built, owned, armed, and equipped in the port of Baltimore, and having provided herself with the commission, sailed from that port on a cruize, and captured the Nereyda at sea, in the year 1818. The sentence of condemnation was pronounced, and the alleged sale took place, in March, 1819, and the name of the captured vessel having been changed to that of *El Congresso de Venezuela*, and a commission obtained for her as a privateer from the government of Venezuela, she set sail for Baltimore, | under the command of Henry Childs, who was the original p. 110
prize master, where she arrived, and was libelled as before stated. It appeared in evidence, that the vessel had continued, from the time of the capture, under the direction and control of Daniels and Childs, both of whom were citizens of the United States, and domiciled at Baltimore. No bill of sale to Francesche was produced, and no other evidence of his purchase, except a certificate from the auctioneer. A decree of restitution to the claimant was pronounced in the District Court, which was affirmed, *pro forma*, in the Circuit Court, and the cause was brought by appeal to this Court.

March 13th, 1822.

The cause was argued, at the last term, on the original evidence, by Mr. *Harper* and Mr. *D. Hoffman*, for the appellant, and by Mr. *Winder*, for the respondent.

Mr. *D. Hoffman*, for the appellant, contended, (1) That the Court is competent to restore this property to the appellant, by the general principles of the *jus gentium*, without any reference to the proof, that

the neutrality and laws of this country have been violated by the captors, but on the sole ground, that this taking on the high seas was not *jure belli*, but wholly without commission, as Jose Artegas does not represent a *State* or *nation*, or a power at war with Spain. That the principles established by cases recently decided in this Court, do *not* impugn the doctrine contended for, as they occurred in the case of commissions |
p. 111 granted by such of the South American provinces as our *government*, in the opinion of the Court, had recognised to be engaged in a civil war with Spain. That our government, and this Court, having, in no instance whatever, recognised Artegas as engaged in a war with *Spain*, he is as incompetent to grant commissions of prize, as *any other individual* in the Spanish provinces. That this Court, therefore, as an *Instance* Court, will decree restitution and damages, as in ordinary cases of maritime tort.

2. That the neutrality and laws of this country having been violated by the captors, this Court will decree restitution on that ground, even if the authority under which they acted were, in other respects, fully competent.

3. If the Court has the power to restore this property, either on the ground of the total inability of Artegas to issue commissions of prize, *or* in vindication of our violated laws and neutrality, it *will look behind the condemnation of any Court for the existence of these facts*, and if they be found to exist, will wholly disregard the condemnation, and consider it rather as an aggravation than an extenuation of the wrong.

4. That this Court, in restoring this property, on the ground of violated neutrality and laws, will not disturb the decree of condemnation, or in any degree impugn the received doctrine of the conclusiveness of admiralty decrees, as said condemnation was made without any reference to our laws, or inquiry as to the ownership or equipment of the privateer. |
p. 112 5. That there is no sufficient proof of the condemnation, which is relied on; that this Court will require the exhibition at least of the *libel*, in order to disclose the grounds of the prize proceedings.

6. That the Vice Admiralty of Juan Griego must be regarded by this Court as wholly incompetent to pass on this prize, *first*, because there is no evidence whatever of an alliance between Venezuela and the Banda Oriental; and, if the alliance were proved, then, *secondly*, because this sentence was passed by the Court of an ally, and not by a Court of the belligerent captor sitting in the country of an ally.

7. That the evidence of the claimant's purchase is not sufficient; and, if it were, his title would be affected by those infirmities which attached to the right of the captors.[1]

[1] These points having been argued by Mr. *Hoffman* in the preceding cases of the Gran Para, (7 *Wheat.* 471.) the Santa Maria, (*Id.* p. 490.) and the Arrogante Barcelones, (*Id.* p. 496.) he referred the Court to his former arguments, which will be found reported in those cases.

8. That under the circumstances of this case, the new commission granted to the Nereyda, by the government of Venezuela, after its condemnation, and the alleged purchase of it by Francesche, can afford it no protection in this Court; that the doctrine of the immunity of sovereign rights, when it has an extra-territorial operation, is altogether inapplicable to the present case.

9. That as the evidence in this cause connects the Court of Juan Griego, its proceedings, and | the commission of the Nereyda, with the p. 113
manifest violators of our laws of neutrality, and the treaty with Spain, and evinces the whole to be a *congeries* of frauds practised on our laws by our *own citizens*, aided and sustained by *foreigners*, this Court will maintain the integrity of those laws, and pay no more regard, and, perhaps, less, to the commission, than to the condemnation.

And, first, as to the effect of the commission: most of what has already been submitted to the Court as to the inefficiency even of a genuine sale of such a privateer to the government of any of the South American provinces, and the inability of a condemnation, even of a *competent* Court, to deprive this tribunal of its restoring power, will apply with equal, and perhaps greater force, to the immunity claimed for this prize from the commission with which she is now clothed.

If this immunity be allowed, it must be on the ground, that the sovereignty of Venezuela would be improperly subjected to judicature, and that this commission imparts to the vessel the same privilege from arrest, or detention, which is due in certain cases to a sovereign, or his ambassadors. This is founded wholly on an assumption, first, of the *fact*, that sovereignty is by this proceeding brought into judicature; and, secondly, of a *principle*, that sovereignty cannot, in any case, be thus dealt with; both of which, it is presumed, are untenable. We contend, that the restoration of this prize, notwithstanding the commission, would, in no degree, affect the rights or dignity of the government of Venezuela; and that if our laws have | been violated, the power of p. 114
restitution cannot be impaired, even if the rights of sovereignty were implicated; that the government of Venezuela, even if regarded, in all respects, as that of a free and independent State, has no sovereign rights in this country, when they come in collision with our own; that all sovereignty is, in its nature, as a general rule, local, and that its extra-territorial operation is to be found only in a few cases of exception to that rule.

This commission, like the condemnation, is a sovereign act, good for some purposes, and wholly inoperative as to others. The commission would justify the capture of Spanish property; that power this Court cannot call in question; but the commission is not good to disarm this Court of a power which it would otherwise possess, viz. of restoring this

vessel, because gained by the unlawful use of American means. The taking of this vessel, by our citizens, *per se*, rendered her justiciable in this Court; she is liable to the jurisdiction of American admiralty tribunals, at any remote period, and into whatsoever hands she may have come, whether by condemnation, *bona fide* sale, or otherwise; and though, in the exercise of this power, such condemnation, sale, or commission, may be rendered (in a degree) inoperative, this is only an incidental or collateral effect; the Court would not directly impugn either; it merely restores the possession to those from whom, *quoad* this country, it had been illegally wrested. And if subsequently the condemnation, sale, or commission, could benefit those claiming under
p. 115 them, | or either of them, this Court would have no power to disturb such possession or title.

The commission which has been given to this prize, is not sustained by any principles similar, or equivalent to those on which the force of condemnations ordinarily rests. It can seek no aid from the doctrine of *comity;* it can claim no exemption from the binding operation of an actual, or supposed notice of a proceeding, in which all the world is a party; it can demand no privilege from the doctrine of the absolute coequality of all nations. On what principle, then, can the commission shield the vessel from the power of this Court? These cruizers bear the flag, and are clothed with the commissions of the country of their adoption; and yet we know, that this Court, in vindication of the laws of the land, would condemn them, on informations filed under the neutrality acts; and this, too, even were they public, or national vessels of war.[1] Sovereignty, no doubt, would be as much implicated in the one case, as in the other. It may, however, be said, that the *Nereyda* never violated the laws of this country, but that it is the capturing vessel which is *in delicto;* true; but the very ground on which the *res subjecta* is now claimed, is, that it never vested in the captors, as far as concerns this country. The innocence of the *res capta*, and the illegal means used for its acquisition, are the very grounds of our libel, and the foundation on
p. 116 which the power of this Court reposes. If the capturing | vessel has broken our laws, and the fruit of its illegal act be within the reach of this Court, no power is competent to arrest its arm. If a commission or condemnation of the prize could effect this, legislation would be worse than vain; it would be clothing foreign powers with the right of dispensing with our most solemn, important, and penal laws; and, in the present case, it would be yielding to an unknown, undefined, self-created power, not only the rights of nations in their fullest extent, but the privilege of seducing our own citizens to the violation of our laws; and this, too, with perfect impunity, as the personal sanctions of the laws are not only

[1] 1 *Wheat. Rep.* 253.

extremely difficult to be enforced, but there is no occasion for the offenders to come within the reach of our Courts.

The cases of the *Exchange*,[1] and the *Cassius*,[2] will probably be relied on, as establishing the doctrine that the commission conferred on this vessel by the government of Venezuela, as the sovereign act of a State or nation, so effectually screens the vessel from judicial cognizance, that this Court dare not examine into the cause, but must leave the vessel in the undisturbed possession of those holding the commission. If we analyze this celebrated case of the *Exchange*, and collate its facts and principles with that now under adjudication, we shall find them to stand on grounds essentially different :

1. The seizure of the Exchange was made by the sovereign power of France, from an American | citizen who had violated his neutrality, p. 117
and had thereby become *quasi* an enemy of that country. 2. The seizure was in the exercise of what was claimed by France as a belligerent right. 3. The Exchange, when she returned into our waters, was actually and *bona fide* a public vessel of war, held by the Emperor Napoleon, *jure coronæ*, and bore the flag and commission of a national ship of war. 4. The Exchange was in the possession of a sovereign who claimed a *title* in her, and who had done no act by which he could be subjected to judicature. 5. The case of the Exchange rested on the personal character and immunity of sovereigns, and an immunity was claimed for this vessel only as extensive as that which is allowed in the three cases, of the sovereign himself, his ambassadors, and his armies *in transitu*. 6. The Exchange entered the port of Philadelphia in *distress*, and sought an asylum *bona fide*. During this time she demeaned herself with strict propriety, and no act was done manifesting a consent to submit to judicature, nor by our government to exact it. 7. The libel against the Exchange involved the question of sovereign title as well as possession. It was a *petitory* suit, of which this Court could have no jurisdiction whatever. 8. There was a suggestion by the law officer of the government, on behalf of the French sovereign, and the case was wholly *coram non judice, even if the Exchange had not been a national vessel of war.* 9. The Exchange was not seized on the high seas ; it was a seizure within a port of the French empire, by order of the sovereign, under his *Rambouillet* | decree. There was, therefore, no case within the admiralty. p. 118
The taking was neither a capture, nor a maritime tort ; the Court was, consequently, compelled to leave the possession undisturbed. 10. Its being, at the time of the seizure, *American* property, could in no way invest this Court with the power of restitution, even had it been a maritime seizure *jure belli*. The legality of all captures is to be judged by the Courts of the captor, unless in the two excepted cases of a violation of

[1] 7 *Cranch*, 116. [2] 3 *Dall.* 123.

our territorial limits in effecting the capture, and equipment, ownership, or augmentation of the force of the vessel in this country. The Exchange was embraced by neither exception.

Setting aside the question of the sovereign's title, the case of the Exchange presented nothing more than the ordinary case of an American vessel, which, after being seized *jure belli*, for a violation of her neutrality, returned to this country; the legality of which seizure, it must be admitted, belonged exclusively to the Courts of France. The violation of her neutrality rendered her *quoad hoc* a belligerent. Nay, the very suggestion filed by the attorney general, was avowedly for the purpose of maintaining our neutrality inviolate; and although the decree to which she had rendered herself obnoxious, might have been a most arbitrary, and even wanton departure from the law of nations. This was not a matter for our Courts, but for our government to judge of, and to remedy; for had the government declared the Rambouillet
p. 119 decree contrary to the law of nations, still, this | Court could not have restored the Exchange.[1] This principle alone would have justified the Court in refusing to restore the Exchange to its former owner. The case of the Exchange was made to rest on two distinct points, either of which was sufficient to decide the cause. *First*, whether the Court could restore *American* property, which might have been unjustly or illegally seized by a foreign government. This was, in truth, the only essential point. The cases of the *Betsey*,[2] *Del Col* v. *Arnold*,[3] and some others, seemed to sanction the right of restoring, simply on the ground of its being American property. A *second* question was, therefore, made, which, though but auxiliary, assumed, in the course of the argument, the chief importance. It was contended, that as the Exchange was now the property of a sovereign, which had been admitted into our country by implied consent, and which, during her stay, had done no act to terminate that permission, this Court must regard the vessel as entitled to the same immunity as would be due to ambassadors, or foreign troops passing by consent through our country. Much learning and eloquence were, no doubt, displayed in the argument of this point; but, it is conceived, that had the doctrine, since so clearly laid down in the case of the
p. 120 *Invincible*,[4] been at that time as well defined and understood | as it is at present, the case of the Exchange would have been decided without reference to the question of sovereign immunity.

The following points of comparison occur between the Exchange and the case now under adjudication:

1. The Nereyda was not seized by any sovereign power, but by Daniels, a private individual, a citizen of the United States, acting under

[1] Williams v. Amroyd, 7 *Cranch*, 423. [2] 2 *Peters's Adm. Dec.* 330.
[3] 3 *Dall.* 333. [4] 2 *Gallis. Rep.* 36. 1 *Wheat. Rep.* 238.

an authority wholly unknown to this Court, because in no way recognised by this government. 2. The Nereyda never was, and is not at this time, a public vessel of war of the government of Venezuela ; but a privateer, the private property of Daniels, and in his, or, perhaps, Francesche's possession. The commission under which she now appears, imports nothing more than an authority in Childs, her commander, to capture Spanish property ; but it does not render her national or public property. The commission in the case of the Exchange, on the contrary, was also an evidence or muniment of the sovereign's title. The restitution of the Nereyda would deprive an individual of his possession ; but the restitution of the Exchange could not have been effected without judging of the validity of the original seizure, annulling the commission, and pronouncing a sovereign's title wholly void. 3. The Nereyda is expressly claimed on behalf of a private individual. Neither Francesche nor Childs makes any mention of any possession or property being in the government of Venezuela. This proceeding, then, does not call on sovereignty to submit to judicature ; and the commission cannot | require p. 121
of us to consider that as national property, which the whole history of the case proves to be a mere private possession. 4. The Nereyda entered our waters voluntarily, and for the express purpose of obtaining an unlawful equipment, and the very persons who brought her here, had violated our laws, and subjected themselves, and the property in their possession, to the jurisdiction of our Courts. No asylum, therefore, was granted to the Nereyda, and her officers and crew. The United States cannot be supposed to have admitted the Nereyda, exempt from all inquiry as to her real character, and as to the conduct of those in whose possession she was found. But the Exchange not only arrived here in distress, and demeaned herself with strict propriety, but those who had her in possession had never violated our laws, nor was she ever capable of restitution by this Court ; she entered our ports under an acknowledged and certain immunity. No cession, then, of territorial jurisdiction can be inferred from the entry of the Nereyda into our waters ; and her commission, even if it made her a national vessel, would not, under the circumstances of the case, protect her, allowing the doctrine of sovereign immunity its greatest latitude. Sovereignty is essentially local in its operation ; the moral equality of all nations establishes this as an aphorism in public law. Beyond a nation's dominions, sovereignty has, ordinarily, no operation ; its extra-territorial power is but an exception to a well known rule ; and if we for a moment attend to the principle which supports the exception, we shall | find it, in all cases, to rest on the p. 122
consent, express or implied, of that nation within whose territory the immunity is claimed. The three exceptions so forcibly illustrated in the judgment of the Court in the case of the Exchange, show the local

nature of sovereignty, and strongly evince the special grounds on which the deviation from the general rule is justified. But even in the excepted cases, if there be not the utmost good faith, if there be any circumstances to negative the implication of consent, or any facts unknown at the time of an express compact, which would have prevented such compact, had they been disclosed, the immunity would at once cease.

The claim of immunity for the Exchange, was exacted only to the extent of, and made to rest on those principles which protect from detention or arrest, 1st. a sovereign entering the territory of another; 2dly. ambassadors; and, 3dly. the troops of a foreign prince, to whom a right of passage had been allowed. Now, if a sovereign should enter the dominions of another, without such implied or express consent; or if, after he had entered with consent, he should commit an act *malum in se*, or against the *jus gentium*; or if it be discovered that an ambassador had, prior to his appointment, committed some capital offence against the country to which he is sent; or if the troops, in their passage, should violate the rights of persons, or of property—it is presumed neither of them would be shielded from the penal law of the country.[1] If this be
p. 123 correct, the commission granted | to the Nereyda cannot, on principle, screen her from the restoring power of this Court. The vessels of all nations, public as well as private, may seek an asylum in our ports. During this, we have, ordinarily, no jurisdiction over them. The consent, however, under which they enter, is always subject to the qualification that they have not previously violated our laws or hospitality, and that they are in no other respect amenable to judicature. If the Nereyda had not been taken by United States' arms, this Court could not have interfered in behalf of the Spanish sovereign, from whom his rebellious subjects had taken her. The commission, then, it is presumed, can no more protect her from the power of this Court, than the solemn and public documents by which an ambassador is made the representative of his sovereign, could shield him from the criminal law of the country in which he resides, and whose laws he had previously violated unknown to that country.

The libel in this case does not involve the question of title. As relates to Venezuela, even the right of possession of this prize is not implicated. If this were a *petitory* suit, this Court would disclaim any interference.[2] But the question simply is, whether those who have gained a possession, or their representatives, by means illegal in reference to our laws, shall be permitted to retain that possession against its original possessors, in the very country whose laws have been violated. |

p. 124 The Nereyda being at one time subject to the jurisdiction of this

[1] 4 *Inst.* 152. 3 *Bulst.* 28. *Molloy*, B. 1. ch. 10. s. 12.
[2] 2 *Bro. Civ. & Adm. Law*, 110, 113, 114, 115, 117. 7 *Cranch*, 120, 121.

Court, (had she come into our possession,) the Court will not permit that to be done indirectly, which could not be done directly. This contingent jurisdiction can no more be annihilated or impaired by the act of a nation or State, than by an individual. As to this country, the taking was an absolute nullity. There was a deep seated infirmity in the original capture, which could not be cured by the condemnation, nor by Francesche's purchase, even if it had been genuine. For if the condemnation be not sufficient, no act done in execution of that judicial sentence, could be thus operative: *debile fundamentum fallit opus;* and Francesche could succeed only to the title of Daniels, whatever that was. Nor could the commission rehabilitate or perfect the title. It does not pretend to *assert* a title in any one, nor does it design to *confer* a title on Francesche, or to intimate any claim of property in the government granting it. This sovereign act, then, imports nothing further than an authority to that vessel to capture Spanish property.

In the case of the Exchange, the prominent difficulty was, that its possessor being a sovereign, could not be brought into Court. But, in the present case, those claiming under the commission, have not only voluntarily appeared and claimed the Nereyda, but they have expressly submitted the case to the jurisdiction of this Court. The claimant asked for, and received the Nereyda on stipulation; this cancels, or waives every objection | to jurisdiction, if any existed.[1] Not that it is meant p. 125
to assert, in general, that consent can confer jurisdiction; but that wherever a Court has jurisdiction of the subject matter, but not of the person, consent would remove the objection. If, on the other hand, the Court has no jurisdiction over the subject matter, but of the persons only, it would not be competent to act from the consent of the parties. In the case now before the Court, there is no one act of the claimant, or of others, indicating any interest in this proceeding on the part of the government of Venezuela; but the case is impressed throughout with the character of a mere private and individual claim.

In the case of the Cassius, a prohibition was allowed on the ground, 1st. That the prize itself had been carried *infra præsidia;* 2dly. That the question of damages should follow the main question, which belonged exclusively to the Court of the captor; 3dly. That as the Cassius was, and ever had been, the property of a sovereign nation, and not a mere privateer, our Courts had no power to make her respond in damages; 4thly. That there was no proof that the commander of the Cassius was an American citizen; 5thly. That the treaty with France gave the exclusive cognizance, in all cases of prizes made by their vessels of war, to the Courts of France.

Is there any point in this case which militates against the restitution

[1] The Abby, 1 *Mason's Rep.* 364. 2 *Bro. Civ. & Adm. Law,* 398.

p. 126 of the Nereyda? In the | case of the Cassius, the Court very properly decided, that the privateer should not respond in damages for the captured property; as this had been taken *infra præsidia capientium*, and the Court of the captors having the exclusive right to judge of the legality of the capture, the question of damages should follow the main question. It also assumed the doctrine, which has been subsequently fully established in the case of the Invincible,[1] viz. that the power of this Court to take the *res capta* from the possession of a belligerent, and restore it to its former owner, could only be brought into action where the neutrality or territorial jurisdiction of this country had been violated by the captor. The case of the Cassius is, in all its points, good law; it is nothing more than the ordinary case of calling on this Court to decree damages for an illegal capture of American property; no one will pretend to say, that this can be done, unless the Court acquires a jurisdiction by reason of the existence of either of those facts which take the case out of the control of the general rule, which gives to the Courts of the captors the sole right of judging of the validity of all captures. American ownership in the thing captured is not sufficient *per se*, and in the case of the Cassius no other fact appeared in proof. Further; if we advert to the fact, that the Cassius was subsequently prosecuted on an informa-
p. 127 tion for an illegal outfit, which, on that proceeding, was proved, | and she condemned, maugre her commission,[2] the case of the Cassius, on the *civil* proceeding, cannot be regarded as any authority to establish the doctrine of sovereign immunity, when the rights of two sovereigns come in collision.

Mr. *Winder*, contra, contended, 1. That there was no competent claimant before the Court. The vessel libelled originally belonged, as was asserted, to the king of Spain, and was libelled by the Spanish consul, who cannot be considered by this Court as authorized in his general character to appear for his government, when its sovereign rights are drawn in question in our tribunals. He must show some special authority for this purpose.[3]

2. The capture was made *jure belli*, under a regular commission from Artegas, the chief of one of the South American provinces, engaged in the present war between Spain and her colonies. The existence of this civil war is notorious. It has been recognised by various acts of our government; and the consequent right of all the parties engaged in it, to carry on hostilities against each other, has been repeatedly admitted by this Court, and is laid down by all the text writers on the law of nations. The Oriental Republic, or Banda Oriental, is that portion of the ancient vice-royalty of La Plata, lying between the river Uruguay
p. 128 and Brazil; which, for a long period, and at the time | the present capture

[1] 1 *Wheat. Rep.* 238. [2] 1 *Wheat. Rep.* 253. [3] The Anne, 3 *Wheat. Rep.* 435.

was made, carried on hostilities both against its parent country, Spain, and against Portugal, independent of the government established at Buenos Ayres. This fact is stated in the President's message of the 17th of November, 1818, and in the reports of our commissioners, transmitted with it;[1] and is sufficient to authorize the Court to allow to Artegas all the rights of war, according to the principles already settled as applicable to this subject. It is impossible to make any intelligible distinction, in this respect, between the different governments which have successively sprung up in different parts of South America. The rights of war must be allowed to all, or to none. Their existence as governments *de facto*, is matter of history and public notoriety; and the United States have since acknowledged the independence of all of them as they now exist, without pretending accurately to adjust their conflicting claims of territorial jurisdiction among each other.

3. The capture having been made under a lawful commission, was carried into a port of Venezuela, an ally or co-belligerent with the Banda Oriental in the war with Spain, and there condemned as prize to the captors, in the regular Court of the ally. The present claimant asserts his claim as a purchaser under that sentence of condemnation. The fact of the connexion between the different Spanish provinces in the war with the parent country, is mentioned by the President | in his different p. 129
communications to Congress, and he has the exclusive authority of determining the relations of foreign States. There is no doubt, that a valid condemnation may be pronounced in the Court of the captor's country, where the prize is lying in the port of an ally in the war. And if his ports may be used for this, and all other hostile purposes, it is not perceived why the aid of his Courts may not be imparted for the purpose of consummating that title which is acquired by capture, and bringing *infra præsidia*. Indeed, it seems to be settled by the authority of text writers on the law of nations, and by express adjudications, that this may be done.[2] It must be mere matter of arrangement and mutual convenience between the co-belligerents themselves, and no neutral, or other nation, can have any right to complain. The validity of the capture is inquired into by a Court of prize, having an inherent capacity to make the investigation, and to do justice to the claimants as well as the captors. Such was our own practice during the war of the revolution, when Congress authorized our prize Courts to condemn prizes taken by French cruisers, and brought into the ports of the United States.[3] But even supposing the Court of Venezuela not to be competent to adjudicate on the capture by its ally, yet the thing taken being once in its possession,

[1] 4 *Wheat. Rep. App'x. Note* II. p. 23.
[2] 2 *Brown's Adm. & Civ. Law*, 257–281. Oddy v. Bovill, 2 *East's Rep.* 479.
[3] 5 *Wheat. Rep. App'x.* 123.

p. 130 and being the property of Spain, its enemy, it | might proceed to condemn it as such, and the condemnation must give a valid title against all the world.

4. The captured vessel having been thus condemned as prize, was sold, and fitted out as a privateer under a commission from the government of Venezuela. It is insisted, that this condemnation, and the commission thus obtained, are alone sufficient to prevent the Court from inquiring into her former history. The vessel comes into our ports under the general license which both South American and Spanish cruisers enjoy of frequenting them; and so long as she does not abuse that hospitality, by augmenting her force contrary to our laws, has a right to remain, and depart at pleasure. This was the principle established in the case of the *Exchange*. It was not upon the ground, that the vessel had become the property of the French emperor by a regular condemnation as prize, but that she bore his flag and commission, and coming into our ports under a general permission, was not amenable to the jurisdiction of our Courts, any more than that sovereign himself, or his ambassador, would have been. Whether the ship be a public, or a private armed vessel, can make no difference. It is sufficient that she bears the commission of the State, and is engaged in the service of the State. To exert any jurisdiction over her, is to exert a jurisdiction over the sovereign rights of that State, of whose military force she constitutes a part, and, from the nature of the present war, an important part. You may, indeed, by a prospective regulation,
p. 131 revoke the | permission which you have granted to the cruisers of the South American States, provided your act of revocation be impartial, and extend to those of Spain also. But you cannot violate in a particular case the permission you have already granted, and draw to your judicial cognizance the sovereign rights of a State, which is coequal, in the view of the law of nations, with the oldest and proudest sovereignty in the world.

The learned counsel, also, referred to his arguments in other analogous cases before the Court at the same term, which will be found reported in those cases.[1]

Mr. *Harper*, for the appellant, in reply, noticed, 1. The preliminary objection which had been urged on the part of the respondent, that the Spanish consul had no competent authority to institute the present proceeding.

This objection admitted of several answers. In the first place, it was to be recollected, that it was not the sovereignty, or the sovereign rights of the Spanish government, that were here in question. It was

[1] The Santissima Trinidad, (7 *Wheat.* 290.) The Gran Para, (*id.* p. 484.) The Arrogante Barcelones, (*id.* pp. 498. 516.)

a mere right of property, held and claimed by the king, in trust, indeed, for the nation, but still a right of property. Some doubts had been raised, how well founded it was not then necessary to inquire, whether a sovereign could be brought into judicature to defend any of his rights; but surely it had never been doubted, that he | might go there if he thought fit, to p. 132
assert his rights of property. This was the daily practice of our own, and every other government, that respected the laws, and did not act in all cases by its arbitrary will. If the king of Spain could appear voluntarily in a Court of justice, to assert his rights of property, surely he might appear by his agent, his proctor, or his attorney. The consul is the general agent for asserting in Courts of justice the rights of his countrymen, and of his government, as far as they related to property. Here the consul claims; not, however, in his own name, or for himself, but in the name, and for the rights of his government. As to the case of the *Anne*, which has been cited on the other side,[1] the claim was not founded on a right of property, but of violated sovereignty. During the war between the United States and Great Britain, an American privateer had taken a British vessel on the coast of Hispaniola, and, as was alleged, within the Spanish jurisdiction. Spain was neutral; and there being no acknowledged Spanish minister, the Spanish consul interposed a claim, to protect the neutral rights of his government, and complain of their violation. He had no extraordinary powers; and the Court decided, that for this purpose his ordinary powers were not competent. But surely it does not follow from this decision, that if the vessel taken had been a public ship of Spain, he might not have interposed a claim for the property; for he is peculiarly intrusted with the rights of property, | while those of sovereignty are confided to the ambassador or public p. 133
minister.

But, in the second place, if the public minister of Spain alone can act, in a matter of this kind, he has acted here. An express written authority has been produced, from him to the consul, to claim in this very case for the king of Spain. Surely if the king of Spain may come into Court to prosecute his rights, he may come by his attorney, his proctor, or his solicitor, as the case may require. The Canton of Berne once filed a bill in the English High Court of Chancery;[2] and surely the Canton of Berne must have appeared by a solicitor. And how was this solicitor appointed? Unquestionably as the proctor was in the present case, by the accredited minister of the sovereign.

2. He then proceeded to consider the principal questions in the cause, the first of which related to the validity of the commission under which the capture complained of was made, which he contended was invalid, and did not authorize the capture. The commission relied on is

[1] 3 *Wheat. Rep.* 435. [2] 9 *Ves.* 347.

from Jose Artegas, styling himself 'chief of the Oriental Republic,' and 'protector of the Orientals;' and the question is, whether any such republic, community, or government, is known to this Court. This depends upon their recognition by the government of this country, through the President, its constitutional organ for such purposes. This
p. 134 recognition certainly need not include Artegas | by name, as the chief of the supposed republic, government, or community; because, when once their existence is properly made known to this Court, the persons who from time to time act as their chief officers, must be taken to be so. But the government itself must have been acknowledged by the proper authority, before its existence can be noticed, or its acts treated as valid, by this Court. The question, then, is, has any such government as that of 'the Oriental Republic,' or 'the Orientals,' been recognised by the government of the United States? For the decision of this question we must refer to the various acts of recognition which have been done by the President.

The only message of the President to Congress, which contains a distinct recognition of the different South American governments, is that of the 17th of November, 1818.[1] It states, 'that the government of Buenos Ayres declared itself independent in July, 1816, having previously exercised the powers of an independent government, though in the name of the king of Spain, from the year 1810. That *the Banda Oriental*, Entre-Rios, and Paraguay, with the city of Santa Fee, *all of which are also independent*, are unconnected with the present government of Buenos Ayres; that Chili has declared itself independent, and is closely connected with Buenos Ayres; that Venezuela has also declared
p. 135 itself independent, and now maintains the conflict with various | success; and that the remaining parts of South America, except Monte Video, and such other portions of the eastern bank of the La Plata, as are held by Portugal, are still in the possession of Spain, or in a certain degree under her influence.'

Here we find various countries distinctly enumerated, of some of which the governments are noticed, but no mention whatever of the 'Orientals,' or the 'Oriental Republic.' A country called the 'Banda Oriental,' indeed, is mentioned, and we may conjecture, but are no where informed, that it constitutes the whole, or a part of this supposed republic. It is mentioned in connexion with two other countries, called 'Entre-Rios,' and 'Paraguay.' Do they, also, form parts of 'the Orientals,' of whom Jose Artegas is the protector; or of the 'Oriental Republic,' of which he claims to be the chief? We are no where informed by the President; and although it might be plausibly conjectured, yet we know the fact to be otherwise. Paraguay, we know, historically,

[1] 4 *Wheat. Rep. App'x. Note* II. p. 24.

to be altogether separate from the Banda Oriental, and to have a chief of its own, one Francia, who is said to style himself 'consul,' and to conduct his government according to the forms of the Roman Commonwealth. Venezuela is spoken of in the message as a distinct community, and we know it by that name. Chili is mentioned in the same manner, as a distinct community of that name, and, consequently, capable of having a government. Three other countries, or communities, are named in connexion; but we are not | informed whether they constitute the p. 136
territory of one government, of two, or of three; and no mention whatever is made of any such government, community, or people, as the 'Orientals,' or the 'Oriental Republic.'

We are, then, left wholly in the dark by the President on this point; and we cannot look beyond his messages for information, which he alone is authorized to give. We cannot look to the reports of the commissioners for the recognition of this government. This recognition appertains to the President alone, as the constitutional organ of the nation for all such purposes. He has, indeed, thought fit to lay before Congress the reports of the commissioners, as his justification for the step which he took, in recognising some of these governments, and for declining to recognise others. But he cannot have intended by this act, to transfer the decision of this great question of national policy to this Court, or to any other department of the government; and if he had intended to do so, it was not in his power. And if we look to the reports of the commissioners, we shall find abundant matter to justify the President in forbearing to recognise this pretended government. These reasons exist in its unsettled, irregular, and ephemeral character. We were fully informed, by these reports, of the existence and pretensions of Artegas, of the nature of his government, and the countries over which it claimed to extend. One of the reports, that of Mr. Rodney, speaking of the people of the Banda Oriental, and Entre-Rios, says, that they 'have | been compelled to give up every thing like civil avocations, and p. 137
to continue *without any regular kind of government*, under the absolute control of a chief, who, whatever may be his political principles or professions, in practice concentrates all power, legislative, executive, and judicial, in himself.'

3. But, admitting the commission to be valid, there was no valid condemnation of the property captured under its authority.

The paper produced as a condemnation, purports to be the sentence of a Prize Court of Venezuela, sitting at Juan Griego, or Gregorio, in the island of Margaritta, within the territory of that republic. It is objected to this condemnation, first, that it is not proved; and, secondly, that it was pronounced by a Court which had no jurisdiction.

The objection to the proof rests on two grounds. In the first place,

the sentence is not certified under the seal of any Court, or by any person who appears, or is stated or proved to be, the officer of any Court. The person who certifies this sentence, is stated, and proved to be, 'the notary of the Marine at Juan Griego, in Margaritta;' but we are no where informed, that he is charged with, or executes the functions of clerk or register of the Admiralty Court, whose sentence this purports to be, or that he is in any manner employed by it, or authorized to authenticate its proceedings.

In the next place, this sentence, admitting it to be properly authenti-
p. 138 cated, appears alone. It is | unaccompanied by any part of the proceedings in the cause in which it purports to have been pronounced. Before the sentence, decree, or judgment of any Court whatever, can be given in evidence, it must be shown, that it was pronounced in a cause depending before that Court, and within its jurisdiction. This is a universal rule, and applies, for the plainest reasons, to the decisions of Prize Courts, and of all other Courts of justice. Without the production of the proceedings, it will always be impossible to ascertain whether the Court had jurisdiction of the case; a point always, and in all cases, examinable, and which must always be established, before the sentence, judgment, or decree, can be given in evidence. For this reason, the libel and claim in admiralty and prize cases, must be produced, in order to let in the sentence. Not being produced here, the sentence, however well authenticated, must be disregarded.

But if received, it can produce no effect; because, it appears, on its face, to be the sentence of a Court which had no jurisdiction in the case which it undertook to adjudicate.

The commission under which the vessel and cargo in question were captured, as prize of war, was granted by Artegas, as chief of the Orientals, and protector of the Oriental Republic; a government which, if it have any such existence as can be noticed here, is entirely distinct from that of Venezuela, in the Prize Court of which, sitting at Juan Griego, in the island of Margaritta, the condemnation took place. But, it is said, that
p. 139 Venezuela was the ally of Artegas in the war; and that | the Prize Court of an ally may condemn. We deny both these positions.

How does it appear, that Venezuela was the ally of Artegas? The fact is not stated by the President in any of his public communications to Congress. Nor do the commissioners to South America, whose reports he communicated to the legislature, say any thing of such an alliance, or any thing from which it must, or even could be inferred. The President, indeed, states to Congress, as the commissioners had done to him, that both Artegas and Venezuela were at war with Spain. But, does it follow, that they were in alliance with each other? We have lately learned, that war has broken out between the Turks and the

Persians. It may very soon break out between Russia and the Turks. Will the Russians and Persians, in that case, be *ipso facto* allies in the war against Turkey? Alliance means a connected union of efforts and means; and not merely an accidental coincidence of objects. It follows, that the President, by declaring to Congress that Artegas and Venezuela were both engaged in war with Spain, did not declare that Artegas and Venezuela were allies. But, admitting that he had declared it, still his declaration would not be competent evidence of such a fact. When the question relates to the existence of a government, it is proper to refer it to the decision of the chief magistrate, who is intrusted by the constitution with the care and management of our relations with other countries and governments; he must, of necessity, therefore, be constituted the | judge, and the sole judge, of the fact of their existence, p. 140
upon which the exercise of these important functions must depend. As these relations, moreover, must often depend on the state of peace or war in which foreign governments may be, as it respects each other, it may be proper that the President should be constituted, for many purposes, the judge, and even the sole judge, of the existence of a state of war between certain nations; because, out of such a state may grow very important relations between us and them. But what relations can arise out of the fact of their being allies in the war, or each carrying it on separately, by his separate counsels and means? None whatever. It is a mere matter of fact, which, like any other matter, may affect the rights or interests of individuals, but cannot, in any way, become a public concern. Those, consequently, who may wish to set it up, in the course of a judicial proceeding, as the foundation of any right or claim, must prove it, as every other fact is proved. As well might it be attempted to prove, by an executive communication, the fact of capture, or of spoliation of papers, or any other fact on which either party in a prize proceeding might rely, as this fact of an alliance between Artegas and Venezuela, in the war against Spain.

Admitting it, however, to be proved, it immediately brings up the second question, whether the Prize Courts of one ally are competent to take cognizance of captures made under commissions from the other. We insist that they are not, according | to the best established principles p. 141
of prize law.

In this opinion, the most eminent advocates, the soundest elementary writers, and the highest judicial tribunals, with one voice, unite. They all lay it down as an elementary principle, universal in its application, and subject to no exception, that the question of 'prize, or no prize, belongs exclusively to the Courts of the captors' country.' In the case of the *Invincible*,[1] that most eminent and distinguished advocate, now unhappily

[1] 1 *Wheat. Rep.* 246.

no more, who so long adorned and enlightened this Court, and whose opinions had almost acquired the authority of judicial decisions, treats this rule as an axiom, about which there could be no dispute. Mr. PINKNEY there says, that 'if there be any rule of public law better established than another, it is, that the question of prize is solely to be determined in the Courts of the captors' country. The report on the memorial of the king of Prussia's minister, refers to it as the customary law of the whole civilized world. The English Courts of prize have recorded it; the French Courts have recorded it; this Court has recorded it. It pervades all the adjudications on the law of prize, and it lays as an elementary principle at the very foundation of that law.'

The judgment of this Court, in the same case, fully supports the doctrine. It speaks of a sentence as prize under a commission from a power |
p. 142 at war, as the 'act of the sovereign;' as entitled to exemption from scrutiny, 'except in the Courts of that sovereign;' and as not subjecting the captors to any question whatever in any other Court, till those of his sovereign shall have decided, that the seizure was not authorized by the commission. It expressly asserts, that 'the exclusive cognizance of prize questions is yielded to the Courts of the capturing power;' and admits this exclusive cognizance as a general principle.

So, in the case of the *Estrella*,[1] the Court says: 'we have been told, as heretofore, that to the Courts of the nation to which the captor belongs, and from which his commission issues, exclusively appertains the right of adjudicating on all captures and questions of prize. This is not denied, nor has the Court ever felt any disposition to intrench on this rule; but, on the contrary, whenever it occurred, as in the case of the Invincible, it has been governed by it.' It is stated to be a rule 'well established by the customary and conventional law of nations;' and the reasons on which it rests are stated in a clear and satisfactory manner. The rule is thus placed on three grounds: (1.) The dignity of the sovereign who grants the commission; which would be impaired, if any tribunal but those authorized by himself were permitted to take cognizance of the acts done under that commission; in other words, if any one but himself were allowed to superintend the conduct of his agents and officers; |
p. 143 (2.) The efficient restraint and control of those officers and agents; to whom a power most liable to abuse is confided by the prize commission; and, (3.) The responsibility of their sovereign and nation, for the acts of unlawful violence which they may commit against neutrals, should those acts be sanctioned by their own government, through its Prize Courts. Undoubtedly, all these reasons, and especially the two first, require, that the cognizance of questions of prize should be confined exclusively to the Courts of the captors' country; and these reasons

[1] 3 *Wheat. Rep.* 308.

apply as strongly to the Courts of an ally, as to those of a neutral. The Courts of the ally, like those of the neutral, are destitute of the means of inflicting punishment on the captor, if, in making the seizure, he have violated the instructions of his government, acted contrary to its general policy, or exceeded the authority conferred by the commission. Equally with the Courts of a neutral, they are without the means of ascertaining what was the policy of the commissioning government, or its general rules and regulations, or what particular instructions accompanied the commission. It is the practice of every government to require sureties from those to whom it grants commissions of prize, for their proper conduct under the commission, and for the observance of their instructions. These sureties must reside in the country where the commission is granted. Consequently, they must be out of the reach of the government and Courts of an ally, as much as of a neutral; and, consequently, the security must be wholly unavailing, if the | prizes made under the commission, or p. 144
by colour of it, may be carried into the ports of an ally, and adjudicated in his Courts. Not being able to reach the sureties, they would be equally unable to reach the property of the principal offender, which would, also, be in his own country. No decree for damages, or even for costs, however flagrant the case might be, could be enforced against his sureties, or his property. Nothing would be left but the imprisonment of his person; and, as he would have offended against no law of the ally, would have infringed none of its orders or instructions, it would be extremely doubtful, at least, how far any penal proceedings could be supported against his person. All that could be done, would be, to rescue his illegally acquired booty from his grasp, by a sentence of restitution. It is easy to see how utterly inadequate this remedy must often prove, and how greatly the temptation to take, the chance of succeeding in an illegal and unauthorized seizure must be increased, by such a state of impunity.

It cannot escape observation, that no where, by no writer or advocate, nor in any adjudged case, is any distinction taken, or hinted at, between the case of an ally, and that of a neutral, in the application of this rule. It is every where laid down absolutely, and without exception; and in a very recent case, the *Josepha Secunda*,[1] it is taken for granted by this Court, and forms the basis of its decision. |

If we advert to the foundation of the prize jurisdiction, we shall p. 145
find reasons equally strong, for confining it exclusively to the Courts of the captors' country. This jurisdiction is declared by this Court, in the case of *Hudson* v. *Guestier*,[2] to be founded entirely on the 'possession' of the *res capta*. 'The seizure vests the possession in the sovereign of the captor, and subjects the vessel to the jurisdiction of his Courts.'

[1] 5 *Wheat. Rep.* 358. [2] 4 *Cranch's Rep.* 296, 297.

And, again ; ' possession of the *res* by the sovereign, has been considered as giving jurisdiction to his Courts.' Now, let it be asked, who had possession of the Nereyda while she lay at Juan Griego ? Certainly not the government of Venezuela ; but that of Artegas, through its agent and officer, the commander of the capturing vessel. This Court asserts most positively, in the case just cited, ' that the possession of the captor is, in principle, the possession of his sovereign.' They add, ' he, the captor, is commissioned to seize in the name of the sovereign, and is as much an officer appointed for that service, as one who, in the body of a county, serves a civil process.' Then the possession of the *res capta* was in the government of Artegas ; and as it is the possession of the *res* by the sovereign that gives jurisdiction to his Courts, it follows inevitably, that the Courts of Venezuela, the government of which had no possession of the captured property, could take no cognizance of the capture ; and,
p. 146 consequently, that the sentence of the Court of Juan Griego is | void, for want of jurisdiction in the Court by which it was pronounced.

Let it not be imagined, that the possession was altered, or in any manner affected, by the bringing of the captured property into the port of the ally. This Court has emphatically declared, in the same case before cited, that ' the sovereign whose officer has, in his name, captured a vessel as prize of war, remains in possession of that vessel, and has full power over her so long as she is in a situation in which that possession cannot be rightfully devested.' The same doctrine is asserted by all the Judges, in the case of *Rose* v. *Himely*,[1] although there was much difference of opinion among the Judges on other points. Could, then, this possession have been rightfully devested by the government of Venezuela, within whose territory the captured vessel had been brought ? In the case of a neutral territory, this Court has expressly adjudged, in *Hudson* v. *Guestier*,[2] that it could not. Upon what principle, then, could it be devested by the government of an ally ? Ought not the captor to have as much immunity, as much safety, as many privileges in the ports of his friend and ally, his co-belligerent, as in those of a mere neutral ? How could he be deprived of the possession ? It could only be by an act of violence ; and that, *ex vi termini*, would be wrongful. So far from being *rightful*, it would be an act of hostility and war.

p. 147 But might not the captor, it may be asked, part | from his possession, and transfer it to the sovereign of the ally, so as to give jurisdiction to the Courts of the latter ? I answer, that he could not ; because, the possession belongs to his sovereign, and not to him. He is merely the agent of the sovereign, for taking and holding the possession ; and having no authority to transfer the possession, he could not rightfully transfer it, so as to affect the right of his sovereign, to whom it belongs.

[1] 4 *Cranch's Rep.* 268. [2] 4 *Cranch's Rep.* 297.

It would be a breach of faith and duty, in him, to make the transfer; and to accept it would be a wrongful act on the part of the allied sovereign, upon which, according to a universal principle of law, no right could be founded. The captor, it is true, has an interest in the prize, by the grant of his sovereign; but, until a legal condemnation, that interest is inchoate and contingent. In the mean time, he has no power over it, except that of conducting it into a place of safety, and keeping it safely, till it can be brought to adjudication in the Courts of his sovereign.

The treatise of Dr. Brown on the Civil and Admiralty Law,[1] and the case of *Oddy* v. *Bovill*, in the English Court of K. B.,[2] have been cited on the other side, to show that the Courts of one ally may take cognizance of prizes made under the commissions of the other. But Dr. Brown cites no authority, and offers no reasons in support of his doctrine; which is evidently a mere mistake, arising from his having confounded the Courts of an ally with Prize Courts of the capturing power, sitting | within the territory of his ally. This was the case in *Oddy* p. 148
v. *Bovill*, and in the cases there cited from Robinson's Reports. The case of *Oddy* v. *Bovill* related to a Danish vessel, captured by the French, and condemned by the French consul at Malaga, exercising there, by the consent of Spain, the powers of a Prize Court of France, at a time when those two nations were at war against Great Britain, as allies. The question was, whether the condemnation was valid; in other words, whether the French Prize Court had jurisdiction of the case. The decision of the Court of K. B. (two Judges only being present,) was in favour of the jurisdiction. It might here be remarked, that the determination of an English Court of common law, on such a question, made long since our independence, possesses no intrinsic authority here; and that a single case, decided by two Judges only, out of four, or rather out of twelve, has very little authority any where. But, waiving these objections, let it be asked, to what does this decision really amount? Does it affirm the principle contended for; that the Prize Courts of one ally may take cognizance of questions of prize, arising under captures made by the other? Certainly not. It establishes nothing more than this; that one ally may, with the assent of the other, establish Prize Courts of his own, within the territory of that other. This is obviously a very different principle, and entirely free from the objections to which the other is liable. It preserves entire, that great and beneficial rule of public law, founded on the most solid reasons of general | safety, convenience, and p. 149
benefit, that questions of prize shall be exclusively reserved to the Courts of the captors' country. The French Court sitting in Malaga, was as much a French Court, to all intents and purposes, as if it had sat in Marseilles or Brest. Its location in a Spanish port, was a matter in which

[1] Vol. II. p. 257, 281.

[2] 2 *East's Rep.* 479.

Spain alone had any concern. It was wholly indifferent to the opposite belligerent, and to neutrals. Its proceedings and decrees were exactly the same in the one case as in the other. The dignity of the French government was as well preserved, the Court had the same control over the captors, the same means of judging how far their conduct was conformable to the instructions, laws, and policy of their government, and the same means of enforcing decrees against them, for costs and damages. Recourse could as effectually be had to their property or their sureties; and, in case of need, to their government, for redress. The rule is, therefore, maintained in this case, and all its beneficial objects are secured. Whereas, by extending this jurisdiction to the Courts of the ally, this great and beneficial rule is wholly subverted.

These remarks on the case of *Oddy* v. *Bovill*, apply fully to those which are there cited from Robinson's Reports. The first of them, that of the *Christopher*,[1] by no means comes up to the case just commented on. It was the case of a British ship taken by the French, and carried
p. 150 into a port of Spain, then the ally of France; from | whence the papers were sent to Bayonne in France. The ship was there libelled in the Prize Court, and condemned; and the objection to the validity of this condemnation, was not that it was pronounced by the Court of an ally, or by a Court of the captor's government sitting in the territory of an ally; but that when it was pronounced, the *res capta* was within the territory of the ally. This objection was overruled by Sir W. Scott, on the principle repeatedly affirmed by this Court, that the possession of the captor, for, and in behalf of his government, which is the foundation of the prize jurisdiction, continued in the country of the ally. This principle, after much hesitation, was afterwards extended by him in the case of the *Henrick and Maria*,[2] to the case of captured property carried into a neutral port, and lying there when it was condemned in a Court of the captors' country. He declared his own opinion to be different, but held himself bound by a practice long established in the Court where he presided.

The other cases from Robinson, relied on in *Oddy* v. *Bovill*, are those of the *Harmony*, the *Adelaide*, and the *Betsey Cruger*. They are all referred to in a note to the case of the *Christopher*,[3] and were all cases of condemnations by French Prize Courts, sitting in the territory of Holland, while that power was an ally of France, in the war against Great Britain. The vessels were all condemned by *the French commissary of Marine*,
p. 151 at Rotterdam. The two first cases | occurred in 1799; and an order for farther proof being passed, the question of law respecting the legality of such condemnations was reserved. In the third case, that of the *Betsey Cruger*, in 1800, it was given up by the counsel, and the legality

[1] 2 *Rob.* 273. [2] 4 *Rob.* 52. [3] 2 *Rob.* 172.

of the condemnation was admitted by the Court. But, still, it was a condemnation, not by the Court of the ally, as in the case at bar, but by the Court of the captors' country, in strict conformity to the rule for which we contend.

Some general expressions of Sir W. Scott, in pronouncing his judgment in the case of the *Christopher*, are supposed to countenance the doctrine of condemnation by the Courts of an ally. But these expressions must be modified and restrained by reference to the subject matter. He was speaking of a case of condemnation by a Court of the captors' country, sitting in that country, while the *res capta* was in the territory of an ally. To such a case alone was his attention directed; and in reference to such a case alone are his expressions to be considered. Taken, as they must be, with this limitation, they leave untouched the rule for which we contend.

It has been urged, on the other side, that the mere presence of the captured property in the territory of Venezuela, then at war with Spain, gave its Courts a right to treat that property as enemy's property, and to proceed against it as prize. But we are to recollect, that this property was brought there by the captors, in the possession of whose government it was, by force of the seizure; and that this possession, thus acquired, | could not rightfully be devested or disturbed. The property did not p. 152
come thither as the property of Spain, the enemy of Venezuela; but as the property of the captors, her allies, from whom she had no right, or pretence of right, to take it by force. The sovereign of the captors had the possession. The right of the original owner was provisionally devested and destroyed by the capture; and, in this state of things, it could not be considered, or proceeded against, by the government of Venezuela itself, and much less by its Prize Courts, as the property of Spain. Venezuela herself considered the matter in this light. She did not interfere with the possession of the captors, or their rights of property. Her Courts merely attempted, at the instance of the captors, and for their benefit, to exercise, in relation to this property, that prize jurisdiction which belonged exclusively to the Courts of their own country.

4. Admitting, however, the sentence of condemnation to be valid; there is still another ground on which the claim set up under it ought to be rejected by this Court. It is admitted that Daniels is a citizen of the United States, resident with his family in Baltimore; and it is in proof, that the vessel with which he made this capture, was fitted out, armed, and manned in the Chesapeake. If, then, he shall appear to be the real claimant, and not Francesche, in which name Childs professes to claim, his case is exposed to the full operation of that maxim of law, which declares, that no rights can be founded on a wrong: *Quod ex maleficio non oritur actio.* He appears, in that | case, in a Court of the p. 153

United States, to ask its aid in the assertion of a claim founded on a direct violation of our laws and treaties. The acts of Congress expressly forbid, under severe penalties, the armament of vessels within our territory, by our citizens or others, to cruise against any nation with whom we are at peace; and the fourteenth article of the treaty of 1795, with Spain, expressly stipulates, that no American citizen shall take a commission from any foreign power, to cruise against Spain, her people or property, on pain of being treated as pirates. Although it might be difficult, as this Court remarked on a former occasion, to enforce the penalty of piracy against Daniels, there can be no doubt that, if he be the real claimant, his claim is founded on his violation of the laws and treaties of his own country.

Here the learned counsel argued minutely upon the facts, to show, that the alleged sale to Francesche was fraudulent, or had never taken place. He also insisted upon the want of a bill of sale, or some equivalent document, as a fatal objection to the claim of the pretended purchaser.[1]

5. If, however, Francesche must be considered as a real purchaser for himself; and our objections to the commission under which the capture was made, and to the condemnation founded on it, are to be regarded as invalid; we still insist, that the captured property ought
p. 154 to be restored, | on the ground of the illegal outfit of the capturing vessel. Here we are met by two objections; one founded on the condemnation in the Prize Court of Venezuela, by which it is alleged, that all inquiry on the subject is closed; and the other on the commission of prize granted by the government of Venezuela to the captured vessel, after the condemnation.

The first of these objections rests on the ground, that both the capture and the condemnation are valid. We have endeavoured to show, that neither of them is so; because the Oriental Republic, of which Artegas, in granting the commission under which the capture was made, claims to act as the chief, is not a government acknowledged by ours, so as to be known to our Courts of justice; and because the Prize Court of Venezuela had no jurisdiction of the capture, admitting it to have been rightfully made. But if the capture and condemnation be free from these objections, what is the effect of the sentence in withdrawing from our Courts the power of protecting and enforcing our neutrality? This is a momentous question, novel in itself, and of the utmost importance in its consequences to the peace and honour of this nation.

In discussing it we must first turn our attention to the peculiar state of things to which it applies, to the nature of the war out of which it arises, and to the character and structure of the Courts for whose decisions such an effect is claimed.

[1] The Bello Corrunes, 6 *Wheat. Rep.* 170. The Conception, *id.* 239.

In adverting to the state of things to which this question applies, we cannot but remark, that the | nations of South America, now engaged in p. 155
war against Spain, are composed of colonies heretofore kept in a most rigid and slavish state of dependence on the mother country, and studiously debarred from all means of acquiring general knowledge, habits of self-government, or an acquaintance with the rules and principles of public law, as practised or acknowledged by civilized States. Hence, they may be expected to be, and are, in fact, much more anxious to find means of annoying their enemy, than capable of judging how far those means might be consistent with the rights of neutral and friendly nations. They are, moreover, wholly destitute of the elements of maritime power. Their former masters restrained them from commerce, shipbuilding, and navigation; for all of which, indeed, their country, from its want of ports, is peculiarly unfit. Their pursuits and habits are essentially agricultural. They are destitute of ships, equipments, shipbuilders, and mariners. For a naval force, consequently, the want of which they have always severely felt, they must look to foreigners; and there are none so near as the United States, or so ready to aid them, as that portion of our maritime population, which is ever more eager for enterprise and gain, than scrupulous of means.

The manner in which the war has been carried on between the South Americans and Spain, and in which it will, no doubt, continue to be carried on, while it exists, is peculiarly calculated to inflame the resentments of both parties, and to render each more and more eager to seize on every | means of distressing its enemy. The South Americans, too, p. 156
from the infant state and imperfection of their systems of finance, the disturbed state of their country, and their great sacrifices and efforts, are extremely deficient in revenue, and little able to maintain, or to provide a regular naval force for the public service. They cannot take North American vessels into pay, and commission them as public ships. Their only resource, consequently, is to engage and encourage private adventurers, by granting them privateering commissions; and they, unfortunately, find multitudes in this country, who, through lust of gain, or a restless and irregular spirit of enterprise, catch eagerly at this bait. The profits of these irregular adventures depend, almost entirely, on the power of bringing the prizes into the United States; where alone they can find an adequate and advantageous market. Our laws inflict restitution to the former owners, as one of the means, and by far the most efficacious, of restraining these proceedings, so incompatible with our honour, peace, and true interest. Our Courts rigorously and successfully enforce this penalty of restitution. The other, and more penal enactments, are much more easily eluded, by the various artifices and subterfuges which such persons know but too well how to employ. An

attempt is now made to elude this penalty also, by the intervention of South American Courts of Prize. Let this attempt succeed; let such a sentence as that now relied on, be once declared by this Court to be a bar to all inquiry concerning the violation of our laws, our treaties,|
p. 157 and our neutral obligations, by means of which a capture may have been effected; and what prize, seized by forces provided or augmented in our ports, will ever enter them unprovided with such a sentence? Can we shut our eyes to the character and composition of the Courts where these decrees are pronounced; to the course of proceeding by which they are produced; to the means by which they may be, and in fact are, procured? Can we conceal from ourselves what has passed in this very case, and the manner in which the sentence relied on appears to have been obtained? Can we forget what has passed on this subject, in other cases which have been heard during the present term? With all these instructive lessons before our eyes, can we declare, that the doctrine of the conclusiveness of the sentences of Prize Courts will apply, under such circumstances as are connected with this class of cases, and to such an extent as to shut out all inquiry into those antecedent violations of our laws, in which the captures originated? If such a declaration shall be made by this high tribunal, pronouncing, in the last resort, the maritime law of the country, most certainly no future capture will be made under a South American commission, the fruits of which will not find their way hither immediately, clothed with this protecting mantle; and this certainty of success, and impunity, will multiply tenfold the number of depredators, armed and equipt in our ports, to sally forth and seize the property of our neighbours, our friends, and our own citizens.|

p. 158 That we are at liberty to look to considerations of this sort, in the application of established maxims, and rules of law, to new combinations of circumstances, is not only manifest from the nature of the thing, and the general practice of all Courts in analogous cases, but has been emphatically asserted by one of the members of this tribunal, in a very learned and elaborate judgment, which contains many important principles, and cannot fail to attract great attention.[1]

Our laws against arming and equipping vessels in our waters, to cruise against our friends, cannot be enforced; our treaties on this subject cannot be executed; our peace and our honour cannot be preserved; —if it shall be adjudged by this Court, that a sentence of condemnation such as this, precludes all inquiry into the measures and means by which the force for making the capture was provided. Considerations of such magnitude would justify and require a modification of the principle on

[1] Per Mr. Justice STORY, in the case of the *Jeune Eugenie*, since reported in the second volume of Mr. *Mason's Reports*.

which this doctrine of conclusiveness rests, in its application to cases of this description, if it were so extensive as to embrace them.

But we deny that it does embrace them. The principle is merely this; that as Prize Courts are open to all the world, all the world are parties to a prize proceeding, and it, therefore, concludes all the world. There may be some objections to the terms in which this proposition is commonly stated, and to the correctness of the reasoning | which it p. 159
embraces; but it may be admitted to be true in relation to those matters, which come, or might have come, rightfully before the Prize Court. Such are all questions of prize or no prize, and all their incidents. But the rule has never been held to extend, nor do any of the reasons, solid or fanciful, on which it rests, extend to matters which could not, or did not, come rightfully before the Prize Court pronouncing the sentence. Such are all cases where it had no jurisdiction. The point of its jurisdiction, though asserted by it ever so formally and positively, is always open to inquiry; and where it has gone beyond its jurisdiction, its acts are treated as nullities. Why? Because those matters did not, and could not, come rightfully before it. So, its sentence will be disregarded, unless the libel on which it was founded be shown; because, without the libel, it cannot appear that there was jurisdiction; or, consequently, that the matters adjudicated came rightfully before the Court. Now, it is quite clear, that this violation of our neutral duties, and our laws, by providing or augmenting within our territory the force by which this capture was effected, never did come, and never could have come, before the Prize Court at Margaritta. That Court had no knowledge of our laws, and nothing to do with their enforcement. There neither was, nor could be, any party in the proceedings, who had a right to make the objection. It could not have been made by the former owners; who would have been told, and correctly told, that as they were enemies, their property was liable to condemnation, | however it might have been p. 160
seized; that they had nothing to do with the mode, or the means of capture; and that it belonged to the government of the United States alone, whose rights were alleged to have been infringed, to assert and protect those rights, and to complain of the violation of its laws. This would have been a solid and sufficient answer to the former owners. As to the United States; they had not then acknowledged the government of Venezuela, and, consequently, could have no minister or diplomatic agent there, to interpose for the protection of their rights. The question, therefore, never could have been raised or adjudicated in the Prize Court of Venezuela, which had no jurisdiction over it, nor any means of bringing it into judgment. The sentence, consequently, of this Prize Court, is not conclusive on the question of antecedent violations of our laws, committed by making the capture, or preparing or augmenting

the force by means of which it was made. These violations formed no part of the question of prize or no prize, or of any of its incidents; and, consequently, could never have come rightfully, and, in fact, did not come at all, before the Court pronouncing this sentence. Therefore they make no part of the sentence, which is not in the least impugned or impeached by inquiring into them, or inflicting on their authors the penalty of restitution.

Where, indeed, is the difference between this and any other penalty, pronounced by our laws against similar violators? Will it be pretended
p. 161 that we cannot proceed criminally against these | captors, for arming, fitting, or recruiting in our waters, because the fruits of their offence have been adjudged to them as prize, by the Prize Court of Venezuela? I presume not; and if the sentence cannot screen them from one part of the punishment, upon what ground can it be considered as sufficient to screen them from another? Does this Court, in ordering restitution, impeach the sentence, or meddle with it in any manner whatever? Does it inquire whether the sentence was right or wrong? Certainly not; but admitting, that the sentence rightly disposed of the question of prize or no prize, and all its incidents, it seizes the goods, when found within our jurisdiction, as forfeited by the violation of the law, and restores them to the former owner as part of the penalty of this offence. This is the substance, although the form is different.

6. The last question in the cause is, whether the commission of prize, granted to this captured vessel by the government of Venezuela, after the condemnation, can shut out all inquiry into the antecedent violation of our laws, by means of which the capture was effected.

Much of what has already been said, as to the effect of the condemnation itself, will apply here. We cannot but know how easily such commissions as this may be obtained, how readily they are granted, and how certainly every prize ship would be clothed with one, if it were pronounced here to have the effect of preventing all inquiry into the means or place of capture. The mischief, indeed, thus produced, would
p. 162 be less formidable than the | other; because it would apply only to vessels, which are by far the least important objects of capture; but as far as it goes, it would render our laws for the preservation of our neutrality a complete nullity.

And upon what principle can it be contended, that a foreign commission of prize will produce such effects? Upon the principle of comity, it is answered; upon the ground of implied assent, under which the public ships of friendly States come into our ports, and which protects them from molestation while here. But this immunity is granted so long as they comport themselves well; and has never been considered as protecting them from the consequences of violating our laws. To this

point the case of the *Cassius*[1] is full and express. The Cassius was not merely a vessel bearing a French commission of prize, but a public ship of the French government, regularly commissioned as a part of the French navy. But she had been fitted out within our territory, in contravention of our laws; and coming, afterwards, within our jurisdiction, under the French flag, and a regular commission, she was proceeded against to forfeiture for this offence. The decision is cited, relied on, and sanctioned by this Court, in the case of the *Invincible*;[2] and it is declared, that 'there could be no reason suggested for creating a distinction (in relation to the restitution of prizes made in violation of neutrality) | between the national and the private armed vessels of p. 163
a belligerent.'

In this case, indeed, of the Cassius, the vessel which was subjected to the operation of the law, notwithstanding her foreign commission, had herself committed the offence of illegal outfit. But this circumstance can make no difference in the application of the principle of comity, and implied license. If that principle would not protect the offending vessel herself, though clothed with a public commission, and the flag of the navy, *a fortiori*, I apprehend it will not protect the spoil, the fruit of the offence. Why should it protect one more than the other? One is the instrument of the offence, and the other is its product. The offence is committed in relation to both. To punish the offence, and by punishing to restrain its commission, is the object in both cases. This furnishes the reason of the application, which is as strong at least in one case as in the other; indeed, it is much stronger, as far as the practical consequences of the two acts are concerned; for the capturing ship may avoid our ports after she has been well equipped; but the captured ship, which is either to be sold or equipped, must come here for a purchaser, or for equipment. Therefore, in every case, she will be sure to come under the protecting cover of a commission, if you once declare such a cover sufficient.

The cases of the *Exchange*,[3] and the *Invincible*,[4] have been relied on to support the doctrine | of immunity, in application to this case. But p. 164
neither of them resemble it in its great and distinguishing feature of violation of our neutrality. The *Exchange* was an American vessel, seized by a French force at St. Sebastians, in Spain, and conducted to Bayonne, where she was taken into the service of the French government, and regularly commissioned as a part of the French marine. She was, afterwards, sent to sea, and on her passage to the East Indies, was compelled to put into one of our ports by stress of weather. While here, she was libelled by the former owner, on the ground, that she had been

[1] 1 *Dall. Rep.* 121. 2 *Dall. Rep.* 365.
[2] 1 *Wheat. Rep.* 253.
[3] 7 *Cranch's Rep.* 116.
[4] 1 *Wheat. Rep.* 250.

unlawfully seized, and, consequently, that he never had been devested of his property. The French commander produced his commission; and the question was, whether this vessel, not having been in any manner connected, either as instrument or subject, with a violation of our neutrality, was protected by the comity of nations, and the implied license under which she entered our waters. This is manifestly a question altogether different from that now under consideration. There was no violation of our laws, or our neutral obligations, as in the present case. The vessel had demeaned herself peaceably and correctly while within our territory; and though seized, undoubtedly, in a violent and unjustifiable manner, the seizure was not made by means acquired or increased within our territory. It was, in some measure, analogous to the case of a British, or a Portuguese vessel, seized on the high seas by a cruiser
p. 165 regularly fitted out in Venezuela, and commissioned to cruise | against Spain. We could not inquire into the legality of this seizure; which might be legal on the ground of unneutral conduct on the part of the captured vessel. Even if it were one of our own vessels, we could not institute this inquiry, but must, in both cases, remit the question to the domestic forum of the captor. But this case of the *Exchange* has no analogy whatsoever to the case now in question; where the demand of restitution is founded expressly on the violation of our neutrality, our treaties, and our laws.

Neither has the case of the *Invincible* any analogy to this. That was the case of a French privateer, taken by a British cruiser during the war between Great Britain and France, retaken by an American cruiser, we also being then at war with Great Britain, and brought by the recaptor into an American port, where he libelled her for salvage. While these proceedings were pending, a claim for damages was interposed by certain American citizens, who alleged, that the Invincible, before her capture by the British, had plundered them at sea. And the question was, whether this claim could be sustained, or the claimant must be left to seek his remedy against the privateer, in the Courts of France. This Court decided, that the seizure of the American property was an exercise of the rights of war, which must depend for its justification or condemnation on the circumstances of the case. Consequently, that it involved the question of prize or no prize, which belonged exclusively to the Courts of the captors' country. In this respect, they said, there
p. 166 was no | difference between the case of the *Invincible*, and those of the *Cassius* and the *Exchange;* that is, between a private armed ship, and a ship belonging to the national marine. They were all parts of the public force, though raised and supported in different manners; and the legality or illegality of their conduct in making any capture, being a question of prize or no prize, equally belonged to the exclusive cognizance

of their domestic tribunals. This principle, it is quite clear, had no analogy to that now advanced in support of the claim of the captors. There was no illegal outfit. No violation of our neutrality, or our laws, was alleged or pretended. The act complained of was a capture, as of enemy's property, under a regular French commission, by a vessel regularly fitted out in the French territory. This capture might be a good prize, according to the law of nations, by reason of some unneutral conduct in the owner, or his agents, which rendered him, *pro tanto*, a belligerent. Consequently, it was a simple question of prize or no prize, and was most correctly adjudged to belong exclusively to the Courts of the captors' country. But had a violation of our neutrality been alleged, either in making the capture, or in preparing the means of making it, the case would so far have resembled ours, and a different course would, no doubt, have been pursued.

March 15th, 1822.

The cause was continued to the next term, under the following order for farther proof. |

ORDER. This cause came on to be heard, on the transcript of the p. 167
record of the Circuit Court of the United States for the District of Maryland, and on certain exhibits and depositions filed by consent, and was argued by counsel. On consideration whereof, this Court doth DIRECT and ORDER, that the respondent have liberty to produce a copy of the libel or other paper on which the sentence of condemnation in the proceedings mentioned was founded, or to account for the non-production of such document; and that the parties be at liberty to take any proof which may tend to show, that the sale of the Nereyda was or was not real, and that Antonio Julio Francesche, in the proceedings mentioned, was or was not a *bonæ fidei* purchaser for himself, and is, or is not, the present owner of the said vessel.

February 7th, 1823.

The cause was again argued by the same counsel, on the farther proof produced at the present term.

March 8th.

Mr. Justice STORY delivered the opinion of the Court. This cause was heard at the last term, and an order was then made, requiring the claimant to produce a copy of the libel, or other paper on which the sentence was founded, or to account for the non-production of such document; and also requiring the production of farther proof of the reality of the asserted sale of the Nereyda, and of the proprietary interest of the asserted owner. The cause has now been argued upon the farther proof brought in by the parties, and stands for the judgment of the Court. |

p. 168 The Nereyda was a Spanish ship of war, and was captured by the privateer Irresistible, of which John D. Daniels was commander, and Henry Childs, (the claimant,) a lieutenant, under an asserted commission of the Oriental Republic of Rio de la Plata, and was carried into Margaritta, in Venezuela, and there condemned as prize to the captors by the Vice Admiralty Court of that island. A sale is asserted to have been there made of her to the claimant, Francesche, after condemnation, for the sum of thirty thousand dollars. She soon afterwards left Margaritta, under the command of Childs, who was the original prize master, and arrived at Baltimore, the place of residence of Childs and Daniels, who are both American citizens; and her subsequent history, after seizure and delivery upon stipulation or bail to the claimant, shows, that she has continued exclusively under the control, management, and direction of the same persons.

The order to produce the libel, or to account for the omission, was made upon the fullest consideration by the Court. Whoever sets up a title under a condemnation, is bound to show, that the Court had jurisdiction of the cause; and that the sentence has been rightly pronounced upon the application of parties competent to ask it. For this purpose, it is necessary to show who are the captors, and how the Court has acquired authority to decide the cause. In the ordinary cases of belligerent capture, no difficulty arises on this subject, for the Courts of the captors have general jurisdiction of prize, and their adjudication
p. 169 is conclusive | upon the proprietary interest. But where, as in the present case, the capture is made by captors acting under the commission of a foreign country, such capture gives them a right which no other nation, neutral to them, has authority to impugn, unless for the purpose of vindicating its own violated neutrality. The Courts of another nation, whether an ally or a co-belligerent only, can acquire no general right to entertain cognizance of the cause, unless by the assent, or upon the voluntary submission of the captors. In such a case, it is peculiarly proper to show the jurisdiction of the Court by an exemplification of the proceedings anterior to the sentence of condemnation. And in all cases, it is the habit of Courts of justice to require the production of the libel, or other equivalent document, to verify the nature of the case, and ascertain the foundation of the claim of forfeiture as prize.

Notwithstanding the direct order for the production of the libel in this case, none has been produced; nor has the slightest reason been given to account for its non-production. The general usage of maritime nations, to proceed in prize cases to adjudication in this manner, either by a formal libel, or by some equivalent proceeding, is so notorious, that the omission of it is not to be presumed on the part of any civilized government, which professes to proceed upon the principles of inter-

national law. How, then, are we to account for the omission in this case? If, by the course of proceedings in Venezuela, a libel does not constitute any part of the acts of its Courts, that could | be easily shown. p. 170
The neglect to show this, or in any manner to account for the non-production of the libel, if it exists, cannot but give rise to unfavourable suspicions as to the whole transaction. And where an order for farther proof is made, and the party disobeys its injunctions, or neglects to comply with them, Courts of Prize are in the habit of considering such negligence as contumacy, leading to presumptions fatal to his claim. We think, in this case, that the non-production of the libel, under the circumstances, would justify the rejection of the claim of Francesche.

Upon the other point, as to the proprietary interest of Francesche under the asserted sale, there is certainly very positive testimony of witnesses to the reality of the sale to him, and to his ability to make the purchase. And if this testimony stood alone, although it is certainly not, in all respects, consistent or harmonious, no difficulty would be felt in allowing it entire judicial credence. But it is encountered by very strong circumstances on the other side; and circumstances will sometimes outweigh the most positive testimony. It is remarkable, that from the institution of this cause up to the present time, a period of nearly four years, Francesche, has not, by any personal act, made himself a party to the cause. He has never made any affidavit of proprietary interest; he has never produced any document verified by his testimony; he has never recognised the claim made in his behalf; he has never, as far as we have any knowledge, advanced any money for the defence of it. Yet, the brig is admitted | to have been a valuable p. 171
vessel, and was purchased, as is asserted, for the large sum of thirty thousand dollars. Upon an order of farther proof, it is the usual, and almost invariable practice, for the claimant to make proofs, on his own oath, of his proprietary interest, and to give explanations of the nature, origin, and character of his rights, and of the difficulties which surround them. This it is so much the habit of Courts of Prize to expect, that the very absence of such proofs always leads to considerable doubts. How are we to account for such utter indifference and negligence on the part of Francesche, as to the fate of so valuable a property? Is it consistent with the ordinary prudence which every man applies to the preservation of his own interest? Can it be rationally explained, but upon the supposition, that his interest in this suit is nominal, and not real.

This is not all. Immediately after the ostensible sale to Francesche, the Nereyda was put in command of Childs, an American citizen, who was an utter stranger to him, as far as we have any means of knowledge, and sailed for Baltimore, the home port of the Irresistible, and the

domicil of Daniels and Childs. There is no evidence that she has ever revisited Margaritta, and there is positive evidence, that she has, for the three last years, been in habits of intimacy with the ports of the United States. Where are the owner's instructions, given to the master on his departure for Baltimore? Where is the documentary evidence of Francesche's ownership? Where are the proofs of his disbursements
p. 172 for the vessel | during her subsequent voyages? From the time of her voyage to Baltimore, she has remained under the management of Daniels, or Childs, or some other apparent agent of Daniels. She has undergone extensive repairs, her rig has been altered, heavy expenses have been incurred, and a new master has been appointed to her. Under whose authority have all these acts been done? Where are the orders of Francesche for these acts? Daniels has constantly been connected with the vessel; he has superintended her repairs; he or his agents have paid the bills; he is the reputed owner of the vessel; and he has been consulted as to the material operations. How can all these things be, and yet the real owner be a foreigner, a Venezuelian? How can he be presumed to lay by, without any apparent interposition in the destiny of his own vessel?

There are some other extraordinary circumstances in the case. The Nereyda arrived at Margaritta under the command of Childs, as prize master; and in a few days afterwards, Daniels arrived there with the Irresistible. The crew of the latter vessel run away with her; and Daniels then sailed in the Nereyda, in pursuit of the privateer, and of course on a voyage for his own peculiar benefit. How is this reconcilable with the supposition of a real sale to Francesche? What interest had the latter in regaining the Irresistible, or subduing a revolted crew? Why should his vessel, after that object was accomplished, have gone to Baltimore? Why should he intrust to strangers, for a voyage in which
p. 173 he had no apparent interest, | so valuable a property? If he made any contract for that voyage, why is not that contract produced? These are questions which it seems very difficult to answer in any manner useful to the asserted proprietary interest of Francesche. Yet the facts, to which allusion is here made, are drawn from the farther proof of the claimant; and this farther proof, it is not immaterial to observe, comes not from Margaritta, where Francesche resided, and for aught that appears, still resides; but from La Guayra, with which he is not shown to have any immediate connexion.

Looking, therefore, to all the circumstances of the case, the fact of the unchanged possession of the captors, the habits of the vessel, the apparent control of the property by Daniels, the utter absence of all proper documentary proofs of ownership, instructions, disbursements, and even connexion with her on the part of the claimant, we think that

there is the strongest reason to believe, that no real sale ever took place, and that the property remains still in the original captors, unaffected by the asserted transfer. The positive evidence is completely borne down by the strong and irresistible current of circumstantial evidence which opposes it.

Upon both grounds, therefore, viz. the omission to produce the original libel, or account for its non-production, and the insufficiency of the proofs of proprietary interest, the Court are of opinion, that the cause must be decided against the asserted claim.

If this be so, then, as it is clear that the original | outfit of the privateer p. 174
Irresistible was illegal, upon the principles already established by this Court, the property of the Nereyda remains in his majesty the King of Spain, and ought to be restored accordingly. The decree of the Circuit Court is, therefore, reversed, and the Nereyda is ordered to be restored to the libellant, with costs of suit.

Decree reversed.

The Experiment.

(8 Wheaton, 261) 1823.

In cases of collusive capture, papers found on board one captured vessel may be invoked into the case of another captured on the same cruise.

A commission obtained by fraudulent misrepresentations, will not vest the interests of prize.

But a collusive capture made under a commission, is not, *per se*, evidence that the commission was fraudulently obtained.

A collusive capture vests no title in the captors, not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property.

APPEAL from the decree of the Circuit Court of Massachusetts, affirming the decree of the District Court of Maine, by which the sloop Experiment, and cargo, were condemned to the United States, as having been collusively captured by | the private armed schooner Fly. The p. 262
facts (so far as necessary) are stated in the opinion of this Court.

February 11*th.*

Mr. *Webster*, for the appellants, argued, that this case was distinguishable in its circumstances from that of the *George*,[1] captured by the same privateer, and adjudged by this Court to be a collusive capture.

Mr. *Pitman*, for the United States, argued upon the facts with great minuteness and ability, to show, that the capture was made *mala fide*. He, also, contended, that the captors, who had obtained their com-

[1] 1 *Wheat. Rep.* 408. 2 *Wheat. Rep.* 278.

mission for the fraudulent purpose of violating the laws of the United States, and who had been detected by this Court in an attempt to impose on it in a former case,[1] could not be entitled to derive any benefit from their commission, even supposing the capture in the present instance not to be collusive. The Court had already settled certain principles analogous to that on which he insisted. Thus, it has been determined, that if a neutral ship-owner lend his name to cover a fraud with regard to the *cargo*, this will subject the *ship* to confiscation.[2] So, if a party attempt to impose upon the Court by knowingly or fraudulently claiming
p. 263 as his own, property belonging in part to others, he will not | be entitled to restitution of that portion which he may ultimately establish as his own.[3] And in the case of the *Anne*, the Court distinctly recognise the principle, that fraud will forfeit all rights to which captors might otherwise have been entitled under their commission.[4] He also cited authorities to show, that the Court would take notice of facts which came judicially into their view in the case with which this was so closely associated, and would severely scrutinize the conduct of the same parties in a similar transaction.[5]

February 14th.

Mr. Justice STORY delivered the opinion of the Court. This is a prize cause, brought by appeal from the Circuit Court of Massachusetts, affirming, *pro forma*, the decree of the District Court of Maine. The sloop Experiment, and cargo, are confessedly British property, and were captured by the privateer Fly during the late war, and brought in port, and proceeded against by the captors in the proper Court, for the purpose of being adjudged lawful prize. No claim was filed in behalf of the captured; but the United States interposed a claim, upon the ground, that the capture was fraudulent and collusive, and the cargo was introduced into the country in violation of the non-importation acts then in force, which prohibited the importation of goods of British
p. 264 manufacture, | as the goods comprising this cargo certainly were. Upon the trial in the Court below, the claim of the United States was sustained, and the capture being adjudged collusive, a condemnation was decreed to the government. From that decree the captors have appealed to this Court; and the cause now stands for judgment as well upon the original evidence, as the farther proofs which have been produced by the parties in this Court.

The privateer is the same, whose conduct came under consideration in the case of the *George*, reported in 1 *Wheat. Rep.* 408. and 2 *Wheat.*

[1] *Ib.*
[2] The St. Nicholas, 1 *Wheat. Rep.* 417. The Fortuna, 3 *Wheat. Rep.* 236.
[3] The Dos Hermanos, 2 *Wheat. Rep.* 76. [4] 3 *Wheat. Rep.* 448.
[5] The Argo, 1 *Rob. Rep.* 158. The Juffrow Elbrecht, *Id.* 126.

Rep. 278. and was there adjudged to have been collusive. The present capture was made during the same cruise, by the same crew, and about six days only before the capture of the George. Under an order of the Court, the original papers and proceedings in the case of the George, have been invoked into this cause; and after a long interval, during which the parties have had the most ample opportunities to clear the case of any unfounded suspicions, the decision of the Court upon the arguments at the bar, is finally to be pronounced.

At the threshold of the cause, we are met by the question, whether a party claiming under a commission which he has obtained from the government by fraud, or has used in a fraudulent manner, can acquire any right to captures made in virtue of such commission. Undoubtedly a commission may be forfeited by grossly illegal conduct; and a commission fraudulently obtained, is, as to vesting the interests of prize, utterly void. But a commission may be lawfully obtained, although | the p. 265
parties intend to use it as a cover for illegal purposes. It is one thing to procure a commission by fraud, and another to abuse it for bad purposes. And if a commission is fairly obtained, without imposition or fraud upon the officers of government, it is not void merely because the parties privately intend to violate, under its protection, the laws of their country. The abuse, therefore, of the commission, is not, *per se*, evidence that it was originally obtained by fraud and imposition. The illegal acts of the parties are sufficiently punished by depriving them of the fruits of their unlawful enterprises. A collusive capture conveys no title to the captors, not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property.

And, after all, while the commission is unrevoked, it must still remain a question upon each distinct capture, upon the evidence regularly before the Prize Court, whether there be any fraud in the original concoction, or in the conduct of the cruise. We cannot draw in aid the evidence which exclusively belongs to another cause, to fix fraud upon the transaction, unless so far as, upon the general principles of prize proceedings, it may be properly invoked. The present case, then, must depend upon its own circumstances.

It cannot, however, escape the attention of the Court, that this privateer has already been detected in a gross case of collusive capture, on the same cruise, and under the same commission. This is a fact, of which, sitting as a Court of Admiralty, | we are bound to take notice; and it p. 266
certainly raises a presumption of ill faith in other transactions of the same parties, which can be removed only by clear evidence of honest conduct. If the circumstances of other captures, during the same cruise, are such as lead to serious doubts of the fairness of their character, every presumption against them is greatly strengthened; and suspicions once

justly excited in this way, ought not to be easily satisfied. The captors have had full notice of the difficulties of their case, and after an order for farther proof, which should awaken extraordinary diligence, they cannot complain that the Court does not yield implicit belief to new testimony, when it comes laden with grave contradictions, or is opposed by other unsuspected proofs.

Many of the circumstances, which were thought by the Court to be entitled to great weight in the decision of the *George*, have also occurred in the present case. The original equipment, ownership, shipping articles, and conduct of the cruiser, are of course the same. The stay at Machias, the absence of Lieut. Sebor, the very suspicious nature of his journey, the apparent connection of that journey with persons and objects in the immediate vicinity of the place where the voyage of the prize commenced, are distinctly in proof. The bad equipment of the prize, her indifferent condition, and small crew for the voyage, the nature of her cargo, and the flimsy pretences set up for the enterprise, in the letters on board, are circumstances of suspicion, quite as strongly made |
p. 267 out, as in the George. The conduct of the prize, during her ostensible voyage, was still more striking. She was far out of the ordinary course of the voyage, without any necessity, or even plausible excuse. She chose voluntarily to sail along the American coast, out of the track of her voyage, even at the moment when she affected to have notice that the Fly was on a cruise ; and she exposed herself to capture, in a manner that can scarcely be accounted for, except upon the supposition of collusion. The pretence set up for this conduct, is exceedingly slight and unsatisfactory. The circumstances of the capture, too, as they come from the testimony of some of the captors, as well as from a disinterested witness, are not calculated to allay any doubt. Here, as in the George, all of the prize crew, excepting one, were dismissed without any effort to hold them as prisoners, and without any apparent reason for the dismissal. And if the testimony of one of the captors is to be believed, there is entire proof that the prize was long expected, and came as a known friend under preconcerted signals. It may be added, that the testimony of the captors is, in some material respects, inconsistent ; and if the testimony of two disinterested and respectable witnesses is to be credited, the master of the prize, in opposition to his present testimony, admitted, in the most explicit manner, that the capture was collusive.

We do not think that it would conduce to any useful purpose to review the evidence at large. It appears to us to be a case, where the circum-
p. 268 stances | of collusion are quite as strong, if not stronger, than in the George. And we are therefore of opinion, that the decree of condemnation of the prize and her cargo, to the United States, ought to be affirmed, with costs.

The Apollon.—Edon, claimant.

(9 Wheaton, 362) 1824.

A decree of acquittal, on a proceeding *in rem*, without a certificate of probable cause of seizure, and not appealed from with effect, is conclusive, in every inquiry before any other Court, that there was no justifiable cause of seizure.

The French Tonnage Duty Act of the 15th of May, 1820, c. 125., inflicts no forfeiture of the vessel for the non-payment of the tonnage duty. The duty is collectable in the same manner as by the Collection Act of 1799, c. 128.

The 29th section of the Collection Act of 1799, c. 128., does not extend to the case of a vessel arriving from a foreign port, and passing through the conterminous waters of a river, which forms the boundary between the United States and the territory of a foreign state, for the purpose of proceeding to such territory.

The municipal laws of one nation do not extend, in their operation, beyond its own territory, except as regards its own citizens.

A seizure for the breach of the municipal laws of one nation, cannot be made within the territory of another.

It seems that the right of visitation and search, for enforcing the revenue laws of a nation, may be exercised beyond the territorial jurisdiction, upon the high seas, and on vessels belonging to such nation, or bound to its ports.

A municipal seizure cannot be justified or excused, upon the ground of probable cause, unless under the special provisions of some statute.

The probable profits of a voyage, either upon the cargo or freight, do not form an item for the computation of damages, in cases of marine torts.

Where the property is restored, after a detention, demurrage is allowed for the detention of the ship, and interest upon the value of the cargo.

Where the vessel and cargo have been sold, the gross amount of the sales, with interest, is allowed; and an addition of 10 per cent. sometimes made, where the property has been sold under disadvantageous circumstances. |

Counsel fees may be allowed, either as damages or costs, both on the Instance and Prize side of the Court. p. 363

March 13th.

THE cause was argued by the *Attorney-General*,[1] for the respondent, and by Mr. *Harper* and Mr. *Clay*,[2] for the appellant.

March 17th.

Mr. Justice STORY delivered the opinion of the Court.

This is a libel, brought by the master of the French ship Apollon, against the Collector of the District of St. Mary's, for damages occasioned by an asserted illegal seizure of the ship and cargo, by the respondent, while she was lying in Belle river, a branch of the St. Mary's, within the acknowledged territories of the King of Spain.

There is no dispute as to the national character of the ship. It appears that she sailed from France, bound to Charleston, in South Carolina;

[1] He cited Church v. Hubbart, 2 *Cranch*, 187. 234. Locke v. U.S., 7 *Cranch*, 339. 1 *Mass. Rep.* 27. 1 *Gall. Rep.* 111. 315. 5 *Cranch*, 311.

[2] They cited 2 *Cranch*, 122. 3 *Cranch*, 490. 3 *Dall.* 335. 3 *Rob.* 208. 5 *Rob.* 43. 4 *Rob.* 72. 1 *Gall. Rep.* 427. 3 *Wheat. Rep.* 559. 3 *Dall.* 133. 1 *Rob.* 241.

but as apprehensions were then entertained, that the proposed tonnage duty on French vessels might be passed by Congress, an alternative destination was given to her for a Spanish port, the object of the voyage being to land her cargo in the United States, and to take a return cargo of cotton to France. The cargo was partly owned by French subjects, and
p. 364 partly by a Mr. Le Maitre, a domiciled | merchant at Charleston, who was also the consignee. Upon her arrival off the port of Charleston, the master ascertained, that the French tonnage duty act had passed, (act of 15th of May, 1820, ch. 125.) and, therefore, declined entering the port. He had on board some specie belonging to the Bank of the United States, which, by the permission of the collector, was brought on shore by the revenue cutter. Having obtained information from the collector, that Amelia Island was not deemed an American territory, he sailed for that place, under the direction of the consignee ; and there the ship lay for a considerable time, while the master proceeded to St. Augustine, a distance of about eighty miles, where he entered his ship and cargo, and paid the regular duties required by the Spanish authorities. While at this port, he ascertained, that the local authorities had it in contemplation to establish a new port of entry, to be called St. Joseph's, on Belle river, within the Spanish territory, and to appoint officers of the customs to reside there. The unquestionable object of this establishment, as disclosed in some correspondence between the immediate agents, which is inserted in the transcript, was to have a convenient depot, for the purpose of carrying on an illicit trade, in fraud of the revenue and navigation laws of the United States. Indeed, it is manifest, that there could be no other object, for there was no commercial population in the neighbourhood whose wants were to be supplied in the regular course of commerce. Of this object, perhaps, Captain Edon was not ignorant ;
p. 365 but he | does not appear to have participated in any of the schemes connected with it. His own avowed object was, to transship his cargo into the United States, and to receive from thence a cargo of cotton, without subjecting himself to the payment of the French tonnage duty. Part of the cargo was sold at St. Augustine, probably to pay duties and charges ; and upon Captain Edon's return to Amelia Island, under the advice and instructions of the Spanish officers of the customs, he removed his vessel from Amelia Island up Belle river, about six or eight miles ; and after having lain at anchor near St. Joseph's for eighteen days, the ship with her cargo was there seized by the collector of St. Mary's, and carried to the latter port for adjudication. Admiralty proceedings were instituted by the attorney for the United States, in the District Court of Georgia, to subject the ship to the payment of the tonnage duty, and the cargo to forfeiture ; but upon the hearing of the cause, the Court awarded a decree of restitution of the ship and cargo. From this decree

the Government interposed an appeal, but the appeal was finally abandoned before any hearing in the appellate Court. In the mean time the present libel for damages was instituted, and some difficulty arose as to the propriety of entertaining it during the pendency of the other suit, because in that suit it was competent for the Court to award damages, if the seizure was without reasonable cause. The objection was well founded ; but it was withdrawn, from the anxious desire of the Government to have the cause speedily adjudged in the proper tribunal, upon | the substantial merits. Upon the hearing of this cause, the District p. 366
Court pronounced a decree for damages, from which an appeal was taken to the Circuit Court ; and from the decree of the Circuit Court, confirming the decree of the District Court, with an addition of thirty-three and a third per cent. to all demurrage allowed by the latter, the present appeal was taken, and the cause now stands for a final decision.

The questions arising upon the record, have been argued with great zeal and ability, and embrace some considerations, which belong more properly to another department of the government. It cannot, however, escape observation, that this Court has a plain path of duty marked out for it, and that is, to administer the law as it finds it. We cannot enter into political considerations, on points of national policy, or the authority of the government to defend its own rights against the frauds meditated by foreigners against our revenue system, through the instrumentality and protection of a foreign sovereignty. Whatever may be the rights of the government, upon principles of the law of nations, to redress wrongs of this nature, and whatever the powers of Congress to pass suitable laws to cure any defects in the present system, our duty lies in a more narrow compass ; and we must administer the laws as they exist, without straining them to reach public mischiefs, which they were never designed to remedy. It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, | to act on a sudden emergency, or to prevent an irreparable mischief, by p. 367
summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated ; and if they were, justice demands, that the injured party should receive a suitable redress.

The first question is, whether there was a justifiable cause of seizure. This question has been already decided in the proceedings *in rem*, and the decree of acquittal, not having been appealed from with effect, is conclusive evidence in every inquiry before every other tribunal, that there was no such cause. This point was decided upon great consideration, in the case of *Gelston v. Hoyt*, (3 *Wheat. Rep.* 246.) and is not believed to

be susceptible of any legal doubt. In the present case, however, as the parties have been induced to waive objections to this libel, for damages pending the former suit, upon the supposition, that the same questions might be as open here as there, it may not be amiss to examine the ground upon which the right of seizure is now attempted to be maintained. As to any forfeiture, or supposed forfeiture, under the act of 1820, ch. 125. it is very clear, that it cannot be maintained. That act simply authorizes a tonnage duty of eighteen dollars per ton, to be collected on all French
p. 368 ships, which shall be entered in the United States, | and provides for the collection of the duty, in the same manner as tonnage duties are to be collected by the collection act of 1799, ch. 128. ; but this act inflicts no forfeiture for the non-payment of the tonnage duty, nor did the libel *in rem* even affect to proceed for any such forfeiture. The consideration of this act may then be at once dismissed. But the 29th section of the collection act of 1799, is supposed to contain a direct authority for the seizure. That section provides, 'that if any ship or vessel, which shall have arrived within the limits of any district of the United States, from any foreign port or place, shall depart, or attempt to depart from the same, unless to proceed on her way to some interior district, to which she may be bound, before report or entry shall have been made by the master, &c. with the collector of some district of the United States, the master, &c. shall forfeit and pay the sum of 400 dollars ; and it shall be lawful for any collector, &c. to arrest and bring back, or cause to be arrested and brought back, such ship or vessel, to such port of the United States, to which it may be most conveniently done.' It is observable, that no forfeiture is here inflicted upon the vessel or cargo ; but the penalty is personal upon the master. There was no pretence, then, to institute proceedings in the District Court, *in rem*, for the forfeiture, and the delay occasioned by such proceedings was clearly unjustifiable ; in fact, the original libel did not proceed for any forfeiture, except against the cargo. But it is said, that the arrest and bringing into port was justifiable,
p. 369 because | the ship had entered the district of St. Mary's, and had departed therefrom, without making any report or entry. The district of St. Mary's, by law, comprehends 'all the waters, shores, harbours, rivers, creeks, bays, and inlets, from the south point of Jekyl Island, exclusive, to St. Mary's river, inclusive.' St. Mary's river formed, at this period, the boundary between the United States and the Spanish territory, the boundary line, by the treaty of 1795, running through the middle thereof, in its whole course to the Atlantic ocean. The only access from the ocean to the Spanish waters running into the St. Mary's, as well as to the adjacent Spanish territories, was through this river. So that, upon the general principles of the law of nations, the waters of the whole river must be considered as common to both nations, for all purposes of navigation,

as a common highway, necessary for the advantageous use of its own territorial rights and possessions. There is no doubt, that the Apollon did not enter the St. Mary's for the purpose of going into any American port, for trade or intercourse. Her avowed destination was for the Spanish waters and Spanish territories; and she never anchored in the St. Mary's, except upon the Spanish side of the river. Her proceeding up Belle river, was still more decisive of this intention. Under such circumstances, the question arises, whether a mere transit through the waters of the St. Mary's, for the purpose of proceeding to the Spanish territory, is to be deemed an arrival within the limits of the United States from a foreign port, within the sense of the 29th section | of the act already p. 370
referred to. We are decidedly of opinion, that it cannot be so considered. The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction. In the present case, Spain had an equal authority with the United States over the river St. Mary's. The attempt to compel an entry of vessels, destined through those waters to Spanish territories, would be an usurpation of exclusive jurisdiction over all the navigation of the river. If our government had a right to compel the entry at our custom house, of a French ship, in her transit, the same right existed to compel the entry of a Spanish ship. Such a pretension was never asserted; and it would be an unjust interpretation of our laws, to give them a meaning so much at variance with the independence and sovereignty of foreign nations. The true exposition of the 29th section is, that it means to compel an entry of all vessels coming into our waters, being bound to our ports; and the very exception of vessels bound to some interior district, demonstrates the sense of the Legislature, by indicating the entire stress laid upon the destination of the vessel. But, even supposing, for a moment, that our laws have required an entry of the Apollon, in her transit, does it follow, | that the power to arrest her was meant to be given, p. 371
after she had passed into the exclusive territory of a foreign nation? We think not. It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations. The arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations. It is said, that there is a revenue jurisdiction, which is distinct from the ordinary

maritime jurisdiction over waters within the range of a cannon shot from our shores. And the provisions in the collection act of 1799, which authorize a visitation of vessels within four leagues of our coasts, are referred to in proof of the assertion. But where is that right of visitation to be exercised? In a foreign territory, in the exclusive jurisdiction of another sovereign? Certainly not; for the very terms of the act confine it to the ocean, where all nations have a common right, and exercise a common sovereignty. And over what vessels is this right of visitation to be exercised? By the very words of the act, over our own vessels, and over foreign vessels bound to our ports, and over no others. To have gone beyond this, would have been an usurpation of exclusive sovereignty on the ocean, and an exercise of an universal right of search,
p. 372 a right which has never yet been acknowledged by | other nations, and would be resisted by none with more pertinacity than by the American. Assuming, then, the distinction to be founded in law, it is inapplicable to a case where the visitation and arrest have been in a foreign territory. It appears to us, then, that the Apollon was not bound to make entry at our custom house; and that the arrest was, under the circumstances, wholly without justification under our laws.

The next question, which has been argued at the bar, is, whether there was, in this case, probable cause of seizure. The most that can, with correctness, be argued on this point, is, that there was probable cause to arrest the vessel, under the 29th section of the collection act; but neither that section, nor any other law, authorized a seizure as for a forfeiture in this case, much less a prosecution *in rem*, to enforce a forfeiture; and so indeed the original libel *in rem* considered the case. But before adverting to the facts urged in support of the suggestion of probable cause, it may not be improper to consider, how far the existence of probable cause can be inquired into, or constitutes matter of defence in a suit like the present. Some obscurity arose at the argument, from not distinguishing between the effect of probable cause in cases of capture *jure belli*, and the effect in cases of municipal seizures. In respect to the former, no principle is better settled in the law of prize, than the rule that probable cause will not merely excuse, but even, in some cases, justify a capture. If there be probable cause, the captors are entitled, as of right,
p. 373 to an exemption from damages; and if | the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet farther, and gives the captors their costs and expenses in proceeding to adjudication. But the case is far different in respect to municipal seizures. Probable cause has never been supposed to excuse any seizure, except where some statute creates and defines the exemption from damages. The party who seizes, seizes at his peril; if condemnation follows, he is justified; if an acquittal, then he must

refund in damages for the marine tort, unless he can shelter himself behind the protection of some statute. The very act under which the present seizure is sought to be justified, contains an express provision on the subject, and shows the clear opinion of the Legislature. It declares, in the 89th section, 'that when any prosecution shall be commenced, on account of the seizure of any ship or vessel, goods, &c., and judgment shall be given for the claimant, &c., if it shall appear to the Court, before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said Court shall cause a proper certificate, or entry, to be made thereof; and in such case, the claimant, &c. shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit, or judgment, on account of such seizure or prosecution.' By a subsequent act, (act of the 24th of February, 1807, ch. 74.) the like provision is extended to all seizures 'under any act of Congress authorizing such seizures.' It is apparent, from | the very p. 374
language of this clause, that unless the certificate be obtained in the manner prescribed by the law, the seizing officer is liable to a suit for damages. And it was adjudged by this Court, in the case of *Gelston v. Hoyt*, (3 *Wheat. Rep.* 246.) that the denial of such certificate was conclusive evidence that there was no probable cause of seizure. No certificate was given upon the original libel instituted against the Apollon and cargo, and restitution having been decreed without it, it follows, of course, that probable cause can, in point of law, form no excuse against damages in this case. It is true, that if vindictive damages were sought, the circumstances of suspicion might properly go in mitigation; but where, as in the present case, compensation only is sought, the inquiry into the existence of such probable cause, can have no legal operation upon the merits of the controversy.

But how stands the fact as to the existence of probable cause? It has been very justly observed at the bar, that the Court is bound to take notice of public facts and geographical positions; and that this remote part of the country has been infested, at different periods, by smugglers, is matter of general notoriety, and may be gathered from the public documents of the government. But the question, whether the Apollon designed to engage in this unlawful traffic, must be decided by the evidence in this record, and not by mere general suspicions drawn from other sources. It is somewhat remarkable, that no act or attempt of smuggling is charged upon her by any testimony | in the record. Her p. 375
avowed intention was, to send her cargo into the United States: but in what manner? It was perfectly lawful to transship the cargo in American or other foreign vessels, to our ports; no law was violated thereby, and no evasion of the French tonnage duty accomplished; for the expense of the transshipment must have been supposed by Congress to be, in

ordinary cases, a full equivalent to the increased duty. It has been very justly observed at the bar, that the act of Congress was not intended to operate as a non-intercourse or non-importation law, but merely as an additional and onerous tax upon French navigation, in retaliation of the restrictions of France upon our navigation. The policy of the act was, therefore, as completely effected by compelling French ships to perform circuitous voyages, and thus to incur the disadvantages of transshipments, as by payment of the tonnage duty. Now, it is principally from the declarations and admissions of Capt. Edon himself, that the designs of his voyage are known; and if we take part of his testimony, we ought in fairness to call in aid every explanation that he gives on the subject. He utterly disclaims any intention of fraud; and his declarations on this point have not been discredited. But, admit that he had an intention of illegal trade, how could that intention, not carried into effect within our jurisdiction, afford probable cause of seizure in a foreign territory? It was not matter of doubt, that Belle river was within the limits of Florida; and how can there be probable cause of seizure under our laws,
p. 376 when | the vessel is in a place exempt from our jurisdiction?

It is unnecessary to pursue this subject farther, as, in point of law, probable cause, if it existed, would not, under the circumstances of this case, constitute a valid defence. The remaining question is, as to the damages. The District Court allowed the following items of damage: 1. Demurrage of the ship for 175 days, at 30 dollars per day. This item, upon the appeal, was enhanced by the Court, as has been already stated, to 40 dollars per day. 2. The difference between the amount of the sales of the cargo (which was sold under a perishable monition,) being 3523 dollars and 10 cents, with ten per cent. thereon; and the nett proceeds of the sales, which had been restored to the claimants, that difference being 1215 dollars and 99 cents, together with six per cent. interest thereon. 3. The allowance of 250 dollars to the libellant, for travelling expenses to Washington. 4. The allowance to the second captain of 100 dollars, for his travelling expenses to Savannah, on the business of the ship. 5. The allowance of 500 dollars, as necessary counsel fees.

The principal arguments against this decree, have been directed to the allowance of demurrage, as a just measure of compensation. The *Attorney-General* contends, that it ought to be disallowed, as far too high a compensation; the Counsel for the libellant, as an allowance unreasonably low. This Court, on various occasions, has expressed its decided opinion, that the probable profits of a voyage, either upon the
p. 377 ship or cargo, cannot furnish | any just basis for the computation of damages in cases of marine tort. The basis has accordingly been, in every instance, rejected. Where the vessel and cargo are lost or destroyed, the just measure has been deemed to be their actual value, together with

interest upon the amount, from the time of the trespass. Where there has been a partial injury only, that loss being ascertained, a similar rule has been applied. Where the property has been restored after detention, demurrage during the period has been generally allowed for the vessel, and interest upon the value of the cargo. Where the vessel and cargo have been sold, the gross amount of the sales, together with interest, has been adopted, as a fair recompense, and the addition of ten per cent. has been sometimes made, where the property was sold under disadvantageous circumstances, or had not arrived at the country of its destination. Such, it is believed, have been the rules most generally adopted in practice, in cases which did not call for aggravated or vindictive damages. And it may be truly said, that if these rules do not furnish a complete indemnification in all cases, they have so much certainty in their application, and such a tendency to suppress expensive litigation, that they are entitled to some commendation, upon principles of public policy.

But it is now said, that demurrage always arises *ex contractu*, and, therefore, cannot furnish any rule of compensation in cases of tort. The practice in Courts of Admiralty, has certainly been otherwise; and the very cases cited at the bar, | show that no distinction has been p. 378
taken, as to its application, between cases of contract and cases of tort. In truth, demurrage is merely an allowance or compensation for the delay or detention of a vessel. It is often a matter of contract, but not necessarily so. The very circumstance that, in ordinary commercial voyages, a particular sum is deemed by the parties a fair compensation for delays, is the very reason why it is, and ought to be, adopted as a measure of compensation, in cases *ex delicto*. What fairer rule can be adopted, than that which founds itself upon mercantile usage as to indemnity, and fixes a recompense upon the deliberate consideration of all the circumstances attending the usual earnings and expenditures in common voyages? It appears to us, that an allowance, by way of demurrage, is the true measure of damages in all cases of mere detention, for that allowance has reference to the ship's expenses, wear and tare, and common employment. Every other mode of adjusting compensation, would be merely speculative, and liable to the greatest uncertainties. In respect to the quantity of the allowance in the present case, there is a diversity of evidence on the record. Two of the witnesses examined upon the appeal, speak of 30 dollars, and one of 40 dollars, as a reasonable demurrage. The Circuit Court, upon this new testimony, allowed the latter; and as it is perfectly clear, that every Judge, in his own circuit, must have better means of weighing the testimony of credible witnesses, from a more exact acquaintance with their experience and extent of business, than we can | possibly derive from the bare inspection of the p. 379

records ; and as we perceive no reason to be dissatisfied with his judgment, we think that the decree, on this point, ought to be confirmed.

The second item is perfectly correct, except as to the allowance of the ten per cent. The cargo was sold at the market, though not at the port, of its destination ; and from the appraisement, it appears to have sold for a higher price than it was valued at. The ground of the allowance of the ten per cent. then fails, for that is given for supposed losses upon a forced sale, or a falling market.

The third item, though small, does not appear to us proper to be allowed upon principle. It was no necessary expense in the prosecution of the suit ; and, as it has been objected to, it must be struck out. The fourth item is not open to the same objection, and, therefore, may well stand.

The fifth item, allowing 500 dollars as counsel fees, is, in our opinion, unexceptionable. It is the common course of the Admiralty, to allow expenses of this nature, either in the shape of damages, or as part of the costs. The practice is very familiar on the prize side of the Court ; it is not less the law of the Court in instance causes, it resting in sound discretion to allow or refuse the claim.

Upon the whole, the decree of the Circuit Court is to be reformed in these not very important particulars ; in all other respects it is affirmed, and interest is to be allowed, at the rate of six per cent., upon the amount
p. 380 of the decree thus reformed, | from the time of the appeal from the Circuit Court, until it shall be carried into effect in the same Court, pursuant to the mandate of this Court.

DECREE. This cause came on to be heard, &c. On consideration whereof, it is ORDERED and DECREED by the Court, that the decree of the Circuit Court, awarding the sum of 8695 dollars and 37 cents, damages, to the libellant, with his costs of suit, be in part reversed, to wit, for the sum of 602 dollars and 31 cents, and be affirmed in all other respects ; and that the libellant do recover of the respondent, the said amount of damages decreed in the said Circuit Court, deducting the said sum of 602 dollars and 31 cents, to wit, the sum of 8093 dollars and 6 cents, together with interest, at the rate of six per cent. per annum, on the same sum, from the date of the decree in the Circuit Court, to the period of carrying this decree into effect in the Circuit Court, pursuant to the mandate of this Court.

Decree in Circuit Court,		$8695 37
Deduct 10 per cent. on sales of cargo,	$352 31	
Allowance for Washington journey,	250 00	
	$602 31	602 31
		$8093 6

The Fanny.—The Consul General of Portugal, libellant.

(9 Wheaton, 658) 1824.

Case of capture by an armed vessel, fitted out in the ports of the United States, in breach of the neutrality acts. Claim by an alleged *bonæ fidei* purchaser in a foreign port rejected, and restitution decreed to the original owners.

A *bonæ fidei* purchaser, without notice, in such case, is entitled to be reimbursed the freight which he may have paid upon the captured goods; and the innocent neutral carrier of such goods, the same having been transhipped in a foreign port, is entitled to freight out of the goods. |

APPEAL from the Circuit Court of Maryland. p. 659

This was the case of a libel filed by the Consul-General of Portugal, on behalf of certain Portuguese subjects, owners of a number of hides which had been brought from St. Thomas to Baltimore in the brig Fanny. The facts proved in the cause, which the Court considered to be material, are the following:

Some time in the year 1817, Robert M. Goodwin, Clement Cathill, James Halsey, and John R. Mifflin, all of them citizens of the United States, and denominated 'The American concern,' fitted out, at Buenos Ayres, a brig, called *La Republicana*, as a privateer to cruise against the subjects of Spain and Portugal, under a commission obtained for her from Jose Artigas. Thus prepared, she sailed under the command of Obadiah Chase, also a citizen of the United States, and, in February, 1818, she captured the Portuguese brig Aurora, which, with her cargo, were sent to St. Barts, and there sold as American property for about 20,000 dollars. With this money, thus raised, Goodwin proceeded to Baltimore, and there invested it in the purchase of a new brig, called the Athenea, which had been lately built at that port. Having changed her name to that of the New Republicana, both privateers shipped their crews at Baltimore, together with their munitions of war, except the cannon and carriages for the latter vessel, which, with a view of deceiving the custom-house officers, were put on board of a small schooner, and were transferred to this privateer, a few miles below the | fort. The p. 660
commission, together with other papers belonging to the Republicana, were delivered to the New Republicana, and both the privateers proceeded to sea; the latter under the command of the above mentioned Clement Cathill, one of the owners. She soon after fell in with the Portuguese ship Don Pedro de Alcantara, laden with a valuable cargo of hides, sugar, &c. which she captured on the 22d of September, 1818, and ordered in to the Five Islands, there to await the orders of Goodwin. At this place, Goodwin transhipped the principal part of the cargo into several small vessels, which proceeded to the island of St. Thomas, consigned to Souffron & Co., merchants of that place. The residue of the cargo,

except a small part, which was afterwards taken, together with the Don Pedro, by Commodore Jolly, commanding a squadron belonging to the republic of Columbia, was also carried by Goodwin to St. Thomas, in the old privateer, at which place it is probable the whole or a great part of the captured property was sold. Nathaniel Levy, the American Consul at that island, purchased 4004 of the *hides*, which, together with 555 logs of *lignum vitæ*, he shipped in the brig Fanny to Baltimore, where she arrived in January, 1819, consigned to Lyde Goodwin. On the 21st of this month, the hides and *lignum vitæ* were libelled as Portuguese property, illegally taken on the high seas, and on the 27th of the same month, the *lignum vitæ* was released from the operation of the libel.

To this libel a claim was filed by Lyde Goodwin, as agent of Levy,
p. 661 in which it is asserted that | the hides had been purchased by Levy, in the regular course of trade, from Souffron & Co., and all knowledge of the matters alleged in the libel is denied. On the 15th of March the hides were delivered upon stipulation, having been appraised at the sum of 12000 dollars.

In the progress of the cause in the District Court, the owners of the brig Fanny presented to the Judge a petition, setting forth, that on the 6th of October, 1818, Nathan Levy entered into a charter-party of affreightment with the petitioners for the brig Fanny, on certain terms stated in the petition, for a voyage from Baltimore to St. Lucie, and if required, to three other ports in the West Indies, and thence back to Baltimore. That, under this charter-party, the said brig took in a cargo at Baltimore, and sailed to St. Lucie, and to three other ports, and finally delivered the cargo to the said Levy, who afterwards shipped on board the said brig, at St. Thomas, 4000 hides and 555 sticks of lignum vitæ, to be carried to Baltimore, where she arrived on the 17th of January, 1819. That upon her arrival, and when the master was about to deliver the cargo to the consignee of Levy, this libel and claim were filed, and the cargo was taken from the possession of the master by the Marshal, under the process of the said Court. That there was then due to the petitioners, on the said charter-party, the sum of 2094 dollars 50 cents, as admitted by the said Levy, which they pray may be paid out of the proceeds of the hides and *lignum vitæ*. This petition was accompanied by an account,
p. 662 dated the 28th of December, 1818, | signed by Nathan Levy, acknowledging a balance of 2094 dollars 50 cents to be due the said brig Fanny on the charter-party. Below this account is the following entry, not signed by any person : ' The freight on the homeward cargo, consisting of 4004 hides and 555 sticks of *lignum vitæ*, $1047 25.' The Court made an order that the agent of the claimant should pay the freight on the above goods to the amount of 1047 dollars 25 cents.

The District Court decreed the claimants to pay to the libellant the

appraised value of the hides, as mentioned in their stipulation, together with interest and costs, after deducting the amount of freight theretofore ordered to be paid. This decree being wholly affirmed by the Circuit Court, upon an appeal, both parties appealed from that decree to this Court.

Mr. *D. Hoffman*, for the libellant, argued, 1. That this was a piratical taking, there being no sufficient evidence of a valid commission.[1] But if the power granting the commission were valid, still the seizure is piratical, as the commission was not only *amortised*, but transferred to a new vessel and a new commander, by whom it was abused in the grossest acts of violence, evincive of an *animus depredandi*, and which constituted the captors trespassers *ab initio*.[2] Had the authority which granted the commission been competent, | and the proceedings under it p. 663
regular, as the laws of this country have been violated by the captors, who are American citizens, this Court will restore the *res capta*.[3] The appellant claims the protection of this Court, on the ground of his being a *bonæ fidei* purchaser, under a valid condemnation. If this could avail him in law, he has failed in his proof of *bona fides*. Every circumstance of evidence and probability is against him. Admitting, however, that there was a purchase in good faith, and under entire ignorance of the circumstances, the title of this claimant cannot be valid against that of the original owners, since there was no condemnation in point of fact; and if there had been, still, as the taking was either without a valid commission, or in virtue of an *amortised* or abused one, the condemnation would be inoperative.[4]

2. Levy, if free from all blame, cannot sustain his claim, under the doctrine of *market overt*. There can be no such protection for property taken *jure belli*, at least until after condemnation; and the doctrine of *market overt* is itself unknown to the *jus gentium*.[5]

3. A condemnation is produced, but it is wholly unnecessary to dwell on its operation, since a condemnation, in all respects valid as between belligerents, cannot deprive this Court of its power to | restore, when the p. 664
original taking was in violation of our laws. And, *secondly*, the condemnation now exhibited, cannot possibly apply to the property in question, as it will be found, on reference to the dates, that this decree of condemnation was some time after Levy's alleged purchase, and, indeed, only a few days prior to the filing of the libel in this cause. But,

[1] 7 *Wheat. Rep.* 476. 8 *Wheat. Rep.* 111.
[2] 3 *Wood. Lec.* 14 *Johns. Rep.* 273.
[3] 6 *Wheat. Rep.* 152. 7 *Wheat. Rep.* 496. 8 *Wheat. Rep.* 108.
[4] 2 *Bro. Civ. Law*, 55. 252. 253. 268. 461. 464. 1 *Johns. Rep.* 471. *Bee's Rep.* 308. 5 *Wheat. Rep.* 345. 346.
[5] 2 *Wood. Lec.* 429. 1 *Johns. Cas.* 471. *Martens on Priv.* 44. *Moll. de Jure Mar.* 57. 60. 68. 85. *God.* 193. *Hob.* 79. 7 *Wheat. Rep.* 490.
[6] 8 *Wheat. Rep.* 108. 167, 174.

4. The main point of inquiry regards the claim to *freight*. We contend, that the appellant is responsible to us for the entire value of the hides, as the same is ascertained by the stipulation, together with interest; and that the freight bill, though properly paid by the appellant to the innocent ship-owner, cannot now be deducted by this illegal captor, from the amount stipulated to be paid by him. Waiving all question which might be made, as to the power of this Court to decree freight in the case, on the ground of *incidental* jurisdiction, we insist that the present is not a claim by the ship-owner for his freight, but by the appellant, to have the same allowed to him *out of this fund*, as having been properly paid by him. If this Court reject the claim of the appellant to the property, on the ground of its having been illegally captured, and that this infirmity adheres to the property even in the hands of a *bonæ fidei* purchaser, we are at a loss to conceive how this purchaser can rightfully impose any charge or incumbrance whatever upon it. But when we advert to the real
p. 665 character of the appellant, and find him | an unworthy claimant, in truth as much so as the captor himself had been, we cannot suppose that he can be entitled to any favour at the hands of this Court. He brought this prize property into an American port, without the knowledge or privity of its owner, and surely ought not to claim either compensation or indemnity, for doing that which, as to the other party, is *in invitum*, and has proved, in fact, extremely prejudicial to him. If this be a claim on the fund, it is only so as regards the innocent owner. No lien can be created by one who has no property, *general* or *special*, in the thing. If a *malæ fidei* possessor cannot so mortgage or pledge the property, as that such mortgage or pledge shall be valid against the true proprietor, he is not competent to create any lien, nor to impose any charge or incumbrance whatever. But without pressing this point, we do not think that the appellant is entitled to be subrogated to the rights of the innocent ship-owner, if such right of lien even vested in him. If this claim to freight were one *in rem*, as well as *in personam*, and the illegal captors, or those claiming under them, have satisfied the personal obligation, it does not follow that they can now enforce that lien against the fund, which it might, *argumenti gratia*, be admitted that the ship-owner possessed. This is very unlike the case of a *neutral's* claim for freight on belligerent property captured from him by another belligerent. The neutral had a right so to employ his vessel, subject only to the belligerent's right to make the seizure; he, therefore, in such case, takes it *cum onere*, and
p. 666 must pay the | neutral his freight. The object here, however, is to transfer the obligation of paying the freight from the illegal captor to the despoiled individual. If the controversy were now wholly between the Portuguese owners of the property and the innocent American ship-owner, the claim might deserve some consideration. In this case, the ship-owner is the

agent of the captors, or those claiming under them, not of the Portuguese owner, and as such, must look to his employers, and not to the goods; and if, in fact, the illegal captor has paid the freight, he cannot thereby entitle himself to be refunded out of the fruits of his piratical taking. The claim to freight is always conventional; a claim even to *pro rata* freight, arises from some convention, and not from the simple fact of transportation. In this case, no consent of the owners to the shipment to Baltimore can be implied. Our claim to the property is disputed on all points; and if none of these is found tenable, but the taking is ascertained to be a gross act of piracy, it would be a strange anomaly, that an honest and lawful belligerent must pay freight to a neutral ship-owner, and yet that a piratical captor shall be exempt from charges voluntarily imposed by him on the property, and that these shall be cast on those whom he has endeavoured to despoil.

5. The Court below has, also, manifestly erred in allowing the entire freight bill, as this includes a charge on some *lignum vitæ*, which formed no part of that which is owned or demanded by the libellant. We, therefore, ask at the hands of this Court, the whole value of the property, as it is ascertained | by the stipulation, together with interest from its p. 667
date, so that the claim to freight may be wholly rejected. The ship-owner is, indeed, the petitioner for freight in this case; but he has been since paid, and the claim, in truth, is now at the instance of the captor, who desires to be subrogated to the rights of the ship-owner, and to enforce his lien, if he had one. We have endeavoured to show, that no such right existed, and that if it ever did, the *captor* is not entitled to receive the benefit of such lien.

Mr. *Winder*, contra, argued principally upon the facts, to show that the alleged purchase was *bona fide*.

March 15th.

Mr. Justice WASHINGTON, delivered the opinion of the Court; and after stating the case, proceeded as follows:

The above case presents two questions for the consideration of this Court. 1. Whether the Court below was correct, in restoring to the Portuguese owner that part of the cargo of the Fanny which was restored? And, 2. Whether the freight which was ordered by the Court to be paid to the owners of that vessel, ought, in whole or in part, to have been deducted from the appraised value of the hides?

Upon the first question, it is to be observed, that the facts above stated are incontestibly proved by the evidence in the cause. That the capturing vessel, the New Republicana, was built at Baltimore, | purchased p. 668
at that place by citizens of the United States, and there manned and fitted for sea, armed and equipped as a vessel of war, within the waters

and jurisdiction of the United States; and with such equipments, left the United States, to cruise against the vessels and property of Spanish and Portuguese subjects on the high seas; and upon such cruise, captured the Don Pedro de Alcantara, with a valuable cargo, belonging to Portuguese subjects, were facts too clearly proved to be questioned; nor were they questioned by the counsel for the claimants. It is established, by evidence equally clear and uncontradicted, that the 4004 hides which were brought in the Fanny from St. Thomas to Baltimore, upon which the sentence of the Court below operated, formed a part of the cargo of the Don Pedro de Alcantara at the time of her capture, and that they were the property of Portuguese subjects.

This, then, is the case of property belonging to the subjects of a friendly power, captured on the high seas by a privateer, owned and commanded by citizens of the United States, fitted and equipped as a vessel of war, within the waters and jurisdiction of the United States; and, according to the uniform decisions of this Court in similar cases, as well as in others, where similar equipments have been made within the waters of the United States by foreigners, the property so illegally captured and brought within our jurisdiction, must be restored to the original owners, unless it could be maintained that the sale of it to the claimant devested
p. 669 those owners of their right | to the same. But it is to be remarked, in the first place, that the asserted purchase of these hides by Levy is unsupported by any evidence whatever. He alleges in his claim, that he purchased the hides for a valuable consideration from Souffron & Co. in the regular course of trade; but this allegation is not upheld by any written document, or by the testimony of a single witness. The cause was depending more than two years in the Courts below, during all which time it was fully in the power of the claimant, a resident of the island of St. Thomas, to have proved the reality of this purchase, by the testimony of the vendors, or otherwise, if the fact had been as it was alleged.

But, admitting the truth of the asserted sale to Levy, he was, nevertheless, a purchaser from the agent of a tortious possessor of property to which he had no title whatever, and who, consequently, could transfer none to his vendee. The proceedings in the Vice-Admiralty Court of Margarita, by Commodore Jolly, against the Don Pedro de Alcantara and the small part of her cargo which had not been transhipped at the Five Islands, so far from amounting to a sentence of condemnation, even of the property libelled as prize of war, proceeded upon the ground of a recapture from a non-commissioned privateer, for which the recaptor was rewarded by a liberal salvage, and the residue of the sales of the property was decreed to the Portuguese owners, in case they should claim the same within the period of a year and a day. This Court is,
p. 670 therefore, of opinion that | the decree of the Circuit Court, so far as it

restores to the libellant the 4004 hides, or their proceeds, is right, and ought to be affirmed.

The second question respects the freight, which the decree of the Court below ordered to be deducted from the appraised value of the hides; and it is attended by no difficulty but such as arises from the confined and imperfect statement of the facts appearing in this record. That the freight of the *lignum vitæ*, which did not belong to the libellants, and against which the proceedings were abandoned, ought not to have been paid out of the proceeds of the hides, is a matter which we think is quite too clear to be disputed; and we think it probable that the mistake was occasioned by an oversight in the Judge of the District Court, from his not knowing, or recollecting, when the petition for freight was before him, that the *lignum vitæ* had been released from the operation of the libel. The decree, then, must, of course, be reversed, for this reason, and the cause remanded for further proceedings, in order to ascertain and separate the freight upon that article, from that due upon the hides.

But there is, apparently, error in the decree in respect to the whole of the freight, which, it is possible, may be explained and removed by a further examination of this subject in the Court below. The petition for freight claims the precise sum of 2094 dollars and 50 cents, as the balance acknowledged to be due by the claimant, and the account, signed by him on the 28th of December, 1818, which accompanied the petition, amounted | to an acknowledgment that that sum was then due. p. 671
The items of that account are, freight on 1095 barrels of flour, out and home, per charter-party, 5 cases of furniture, 36 bags of corn, and 7 days demurrage. Below that account is stated the freight due upon the hides and lignum vitæ, amounting to 1047 dollars and 25 cents. It would seem, therefore, as if the freight upon the hides and *lignum vitæ*, which arrived in Baltimore some time in January, 1819, was not included in the account signed by the claimant, and if so, it was not claimed to be due, nor required by the petition to be paid. Yet the order of the Court was, that it should be paid, and it was accordingly deducted from the appraised value of the hides. If the case should turn out to be such as is above supposed, it would seem to warrant the conclusion, that the freight upon the hides had been paid by Levy, in which case it ought not to be deducted from their appraised value, unless the reality of the asserted purchase of the hides by Levy should be made to appear to the satisfaction of the Court below, without which, we are of opinion that he is to be considered as a *malæ fidei* possessor, and, consequently, as not entitled to be reimbursed the freight so paid, out of the property of the Portuguese owners. If, on the other hand, it should appear that the claimant was a *bonæ fidei* purchaser of the hides, without notice, or that the freight upon them

had not been paid by him to the owners of the Fanny, then it was properly deducted. |

p. 672 DECREE. This cause came on to be heard, &c. On consideration whereof, it is DECREED and ORDERED, that so much of the decree of the said Circuit Court as orders that the claimant pay to the libellant the appraised value of the hides, in the proceedings mentioned, together with interest and costs of suit, be, and the same is hereby affirmed, with costs, subject, however, to such deduction for freight as the said Circuit Court may hereafter direct, to be paid out of said appraised value, as may be hereafter decreed under the further proceedings in this cause: And as to so much of said decree of said Circuit Court, as directs the amount of freight to be deducted, agreeably to the previous order of said Circuit Court, the same is hereby reversed and annulled. And it is further ORDERED, that said cause be remanded to the said Circuit Court, for further proceedings to be had therein, according to law, for the purpose of ascertaining, upon further proof, whether the claimant had paid the freight of the hides to the owner of the Fanny; and, if so, whether the claimant was a *bonæ fidei* purchaser of said hides, without notice. And if the said Court should be satisfied from such further proof, that the said claimant, Nathan Levy, has paid the owner of the Fanny for said freight, or that he was not such *bonæ fidei* purchaser, without notice, then with instructions not to allow a deduction of freight from the said appraised value. But if the said claimant was such *bonæ fidei* purchaser,

p. 673 without notice, or if said freight had not been paid by said claimant to | the owners of the Fanny, then the freight for the hides, excluding the freight on the *lignum vitæ*, to be deducted from the appraised value of said hides.

The Dos Hermanos—Shields, claimant.

(10 Wheaton, 306) 1825.

Seizures made, *jure belli*, by non-commissioned captors, are made for the government, and no title of prize can be derived but from the Prize Acts.

A non-commissioned captor can only proceed in the Prize Court as for salvage, the amount of which is discretionary.

The appellate Court will not interfere in the exercise of this discretion, as to the amount of salvage allowed, unless in a very clear case of mistake.

An appeal, under the Judiciary Acts of 1789, c. 20. s. 22. and of 1803, c. 353. [xciii.] prayed for, and allowed within five years, is valid, although the security was not given until after the lapse of five years.

The mode of taking the security, and the time for perfecting it, are within the discretion of the Court below, and this Court will not interfere with the exercise of that discretion.

APPEAL from the District Court of Louisiana.

This was the same case, reported 2 *Wheat.* 76. where the decree of the

Court below, condemning the cargo as enemy's property, was affirmed by this Court, reserving the question as to the distribution of the prize proceeds. The original capture was made by Mr. Shields, a Purser of the navy, in the year 1814, in a barge armed and fitted out to cruise, but not regularly attached to the navy. The cause was remanded to the Court below for further proceedings, and that Court decreed the proceeds to be equally distributed between the United States and the captor | without p. 307
deducting the captor's expenses. From this decree the captor appealed to this Court.

March 5th.

Mr. *C. J. Ingersoll*, for the appellants, stated, that it had been generally considered by the text writers, and Courts of Prize, that the right to captures, *jure belli*, was in the government, and that no individual could derive any rights of prize but from the express grant of the government.[1] But, on principle, every individual is in a state of war with the enemies of his country ; and the common law certainly considers the law of nations as authorizing any subject of the belligerent state to seize enemy's property within the realm, or the property of other subjects previously captured by the enemy, to the exclusion of the king, the admiral, and the owner, unless the latter came the same day they were taken, and claimed them *ante occasum solis*.[2] To the same effect is the case in the book of the 7th *Edw.* IV. 14.

The principle is, that personal effects, seized in war, are acquired to the taker by occupancy ; and immovables, such as cities, lands, &c. to the public.[3] But the crown, always rapacious, and seeking to extend its final prerogative, subsequently introduced the doctrine of public title to personal things taken in war. Thus, the statute | 34 Edw. III. c. 1. p. 308
declares, that the crown was always seized of the forfeitures of war ; and hence came the doctrine of the droits of admiralty.[4] It does not appear that this assumption has ever been expressly recognised by this Court as a part of the law of this country ; and, unquestionably, a non-commissioned captor may seize enemy's property,[5] and after a condemnation, as in this case, it must be adjudged to the captors. It is now too late for the government to interpose its claim. The act of the 23d April, 1800, c. 189. [xxxiii.] s. 5. and the Prize Act of 1812, c. 430. [cvii.] gives the proceeds of vessels and goods, adjudged good prize, to the captors. But at all events, the captors are entitled to be repaid their expenses, and to a liberal salvage.[6]

[1] 2 *Wheat. Rep.* Appx. Note I. p. 71.
[2] *Reeves' Hist. Eng. Law*, 371, 372.
[3] *Wood's Inst. Imp. Law*, 154. b. 2. c. 3.
[4] 1 *Ruffh.* 302. 2 *Reeves' Hist. Eng. Law*, 454.
[5] 2 *Wheat. Rep.* Appx. Note I. p. 7.
[6] The San Bernardo, 1 *Rob.* 178. The Haase, *Id.* 24.

The *Attorney General*, contra, argued, that it was established as an elementary principle in the law of prize, that all captures *jure belli*, inured to the public, and that the actual captors could only derive their title from the grant of the government. This was the case with commissioned captors, and still more emphatically as to non-commissioned captors; who, though they had a right to seize enemy's property, could claim no title to the proceeds upon adjudication, except what was derived from the
p. 309 bounty of the public.[1] Whatever might have been the ancient | common-law doctrine in England, it had been long since settled in that country, that all rights of prize were derived from the grant of the crown. Without entering into all the distinctions as to the capacity in which the crown took, whether in the king's office of Admiral, or *jure coronæ*, it might be laid down as a general proposition, that non-commissioned captors, as a matter of strict right, were not entitled to any share of the prizes captured by them. Captures made by tenders or boats, sent out by officers of the navy, but not regularly attached by public authority to the navy, are condemned as droits of admiralty.[2] But in these, and all other cases of seizure by non-commissioned captors, it was usual to reward the takers with a liberal share of the property, in the discretion of the Court of Admiralty.[3] There was no reason why any different principle or mode of proceeding should be adopted in this country. It does not depend upon any peculiar municipal regulations, but grows out of a principle recognized by all the writers on public law: *Bello parta cedunt reipublicæ*.[4] In the present case, a moiety of the proceeds had been allowed to the actual captors as salvage; but the provisions in the Prize Acts for the distribution of prizes, were confined to commissioned public and private armed vessels. |

p. 310 *March 7th.*

Mr. Chief Justice MARSHALL delivered the opinion of the Court, that whatever might have been the ancient doctrine in England in respect to captures in war, it is now clearly established in that kingdom, that all captures *jure belli*, are made for the government; and that no title of prize can be acquired but by the public acts of the government conferring rights on the captors. If the original law of England authorized an individual to acquire to his own use the property of an individual, without any express authority from the public, the law was changed long before the settlement of this country. It never was the law of this country. Before the revolution, all captures from the enemy accrued to the government, to be distributed according to law; and the revolution could not strip the government of this exclusive prerogative, and vest it in indi-

[1] 2 *Wheat. Rep.* Appx. Note I. p. 7. 71.
[2] The Melomasne, 5 *Rob.* 41. The Charlotte, *Id.* 280. and note.
[3] The San Bernardo, 1 *Rob.* 178. The Haase, *Id.* 286. The Amor are *Id.* 303.
[4] The Elsebe, 5 *Rob.* 173. 181.

viduals. It is, then, the settled law of the United States, that all captures made by non-commissioned captors, are made for the government; and since the provisions in the Prize Acts, as to the distribution of prize proceeds, are confined to public and private armed vessels, cruising under a regular commission, the only claim which can be sustained by the captors in cases like the present, must be in the nature of salvage for bringing in and preserving the property.

In the present case, the District Court have awarded one half of the prize proceeds, or salvage, to the captors. It was an exercise of sound discretion; and this Court would, with extreme reluctance, interfere with that discretion, unless | in a very clear case of mistake. We perceive no p. 311
such mistake in this case, and are well satisfied with the amount of the salvage as decreed by the District Court.

As to the question which has been made, whether the appeal was in due time, it appears, that the appeal was prayed for within five years, and was actually allowed by the Court within that period. It is true that the security required by law was not given until after the lapse of the five years; and, under such circumstances, the Court might have disallowed the appeal, and refused the security. But, as the Court accepted it, it must be considered as a sufficient compliance with the order of the Court, and that it had relation back to the time of the allowance of the appeal. The mode of taking the security, and the time for perfecting it, are matters of discretion, to be regulated by the Court granting the appeal; and when its order is complied with, the whole has relation back to the time when the appeal was prayed. We must presume the security was given, in this case, according to the rule prescribed by the District Court, and the appeal was, therefore, in time.

Decree affirmed, with costs.

The Marianna Flora.—The Vice-Consul of Portugal, claimant.

(11 Wheaton, 1) 1826.

In Admiralty proceedings, amendments are made in the appellate Court, not only as to form, but as to matter of substance, as by the filing a new count to the libel; the parties being permitted, whenever public justice, and the substantial merits require it, to introduce new allegations and new proofs; *non allegata allegare, et non probata probare.*

If the amendment is made in the Circuit Court, the cause is heard and adjudicated by that Court, and (upon appeal) by this Court on the new allegation; but if the amendment is allowed by this Court, the cause is remanded to the Circuit Court, with directions to permit the amendment to be made.

An attack made upon a vessel of the United States, by an armed vessel, with the avowed intention of repelling the approach of the former, or of crippling or destroying her, upon a mistaken supposition that she was a piratical cruizer, and without a piratical or felonious intent, or for the purpose of wanton plunder,

or malicious destruction of property, is not a *piratical aggression* under the act of the 3d of March, 1819, c. 75.

Nor is an armed vessel, captured under such circumstances, liable to confiscation as for a hostile aggression, under the general law of nations. |

p. 2 The act extends to *foreign* vessels committing a piratical aggression; and whatever responsibility the nation may incur towards foreign states, by executing its provisions, the tribunals of the United States are bound to carry them into effect.

Pirates may be lawfully captured by the public or private ships of any nation, in peace or in war; for they are *hostes humani generis*.

American ships offending against our own laws, may be seized upon the ocean, and foreign ships thus offending within our territorial jurisdiction, may be pursued and seized upon the ocean, and brought into our ports for adjudication.

But, in such cases, the party seizes at his peril, and is liable to costs and damages if he fails to establish the forfeiture.

Ships of war sailing under the authority of their government, in time of peace, have a right to approach other vessels at sea for the purpose of ascertaining their real characters, so far as the same can be done without the exercise of the right of visitation and search, which does not exist in time of peace.

No vessel is bound to await the approach of armed ships under such circumstances; but such vessel cannot lawfully prevent their approach by the use of force, upon the mere suspicion of danger.

Where an aggression was committed by a foreign armed merchant vessel, on a public armed ship of the United States, under these circumstances, and a combat ensued upon mutual misapprehension and mistake, the commander of the public ship was held exempt from costs and damages for subduing, seizing, and bringing into a port of this country for adjudication, the offending vessel.

APPEAL from the Circuit Court of Massachusetts.

The original libel filed in the District Court against the Portuguese ship Marianna Flora, and cargo, was for an alleged piratical aggression attempted or committed by the ship on the United States armed schooner Alligator, Lieutenant Stockton commander, against the act of Congress of the 3d of March, 1819, c. 77. entitled, 'An act to protect the commerce of the United States, and punish the crime of piracy.' [1] |

[1] Which provides, (sec. 1.) that the President of the United States be authorized and requested to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States, and their crews, from piratical aggressions and depredations. (Sec. 2.) The President of the United States is authorized to instruct the commanders of the public armed vessels of the United States, to subdue, seize, take, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas. (Sec. 3.) Authorizes the merchant vessels of the United States to defend themselves against any piratical aggressions, &c. and to capture the assailant. (Sec. 4.) Whenever any vessel or boat, from which any piratical aggression, search, restraint, depredation, or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any Court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same Court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.

Upon the hearing of the cause in the District Court, the Judge pro- p. 3
nounced an interlocutory sentence of restitution, and subsequently pronounced a further decree for damages, amounting to 19,675 dollars, for the act of sending in the ship for adjudication, and the consequent detention. An appeal was taken by the libellants from both decrees to the Circuit Court; and, afterwards, before the hearing of the appeal, by request of the government of the United States, and with the consent of the libellants, the ship and cargo were restored to the claimants, and further | proceedings respecting the same were abandoned. The only p. 4
question, therefore, litigated in the Circuit Court, was upon the point of damages, and, ultimately, a decree was there pronounced reversing the decree for damages; and this constituted the matter of the present appeal.

Pending the proceedings in the Circuit Court, leave was granted to the libellants to file a new count or allegation, in which the aggression was stated to be hostile, and with intent to sink and destroy the Alligator, and in violation of the law of nations.

The facts which were given in evidence, and relied on to support the allegations in the libel, were substantially as follows: On the morning of the 5th of November, 1821, the Alligator and the Marianna Flora, were mutually descried by each other on the ocean, at the distance of about nine miles, the Alligator being on a cruize against pirates and slave traders, under the instructions of the President, and the Portuguese vessel being bound on a voyage from Bahia to Lisbon, with a valuable cargo on board. The two vessels were then steering on courses nearly at right angles with each other, the Marianna Flora being under the lee bow of the Alligator. A squall soon afterwards came on, which occasioned an obscuration for some time. Upon the clearing up of the weather, it appeared that the Marianna Flora had crossed the point of intersection of the courses of the two vessels, and was about four miles distant on the weather bow of the Alligator. Soon afterwards she shortened sail and | p. 5
hove to, having at this time a vane or flag on her mast, somewhat below the head, which, together with her other manœuvres, induced Lieutenant Stockton to suppose she was in distress, or wished for information. Accordingly, he deemed it his duty, upon this apparent invitation, to approach her, and immediately changed his course towards her. When the Alligator was within long shot of the Portuguese ship, the latter fired a cannon shot ahead of the Alligator, and exhibited the appearance and equipments of an armed vessel. Lieutenant Stockton immediately hoisted the United States' flag and pendant. The Marianna Flora then fired two more guns, one loaded with grape, which fell short, the other loaded with round shot, which passed over and beyond the Alligator. This conduct induced Lieutenant Stockton to believe the ship to be a piratical or a slave vessel, and he directed his own guns to be fired in

return; but as they were only carronades, they did not reach her. The Alligator continued to approach, and the Marianna Flora continued firing at her at times, until she came within musket shot, and then a broadside from the Alligator produced such intimidation that the Portuguese ship almost immediately ceased firing. At that time, and not before, the Portuguese ship hoisted her national flag. Lieutenant Stockton ordered the ship to surrender, and send her boat on board, which was accordingly done. He demanded an explanation; and the statement made to him by the Portuguese master, and other officers, was, that they did not |
p. 6 know him to be an American ship of war, but took him to be a piratical cruizer. Under these circumstances, without much examination of the papers, or the voyage of the ship, Lieutenant Stockton determined to send her into the United States, on account of this, which he deemed a piratical aggression. She was, accordingly, manned, and sent, with her officers and crew, under the orders of Lieutenant Abbot, into Boston.

February 20th.

Mr. *J. Knapp*, for the appellants, argued, (1) upon the facts, to show that the visitation of the Marianna Flora, and her detention for examination and search, were unlawful and unjustifiable. He insisted, that the Portuguese master was deceived by the omission of the Alligator to affirm her flag with a gun, according to the law and usage of the nations on the European continent.[1] He had a lawful right to resist the approach of the other vessel, until assured, beyond all reasonable doubt, of her true national character.[2] A remark of Lord Ellenborough, in an analogous case, recognises such manœuvres as were used by the Marianna Flora, as coming within the legitimate acts of defensive resistance. He says, 'defence might happen in various ways, as by making a show of confidence in the face of an enemy, with a view to deter him from an attack.'[3]
p. 7 Upon the topics of the nature or | character of unblameable defence, and the time when forcible resistance may lawfully begin, and the extent to which it may be carried, particularly between persons belonging to different civil societies, or between vessels of different nations, on the ocean, authorities were cited from various text writers, as applicable to the situation of the Portuguese master, and justifying his conduct.[4] It was asked, if it be lawful for private ships to arm, in time of peace, for the purposes of self-protection, whether that liberty did not comprehend the right to do with force whatever, under existing circumstances of apparent peril, human instinct and natural prudence would dictate? Could the maxim that we must so use what belongs to us as not to infringe the rights

[1] 2 *Azuni*, 203. 2 *Wheat. Rep. Appendix*, 10. 1 *Code des Prises, par Le Beau*, 223.
[2] *Puffend.* l. 2. c. 3. sec. 8. 2 *Rutherf.* 493. 2 *Azuni*, 207.
[3] 6 *East's Rep.* 202. [4] 1 *Ruther.* 372—377. 398. 180. *Puffend.* l. 2. c. 5. § 6. 8.

of others, be inconsistent with this principle? Could it be the duty of the master of a merchant vessel armed for such a purpose, when his nation was at peace with all the world, and when the seas were infested with pirates, to suffer another armed vessel to approach him without first being satisfied of her pacific intentions? Still less was it his duty to submit to the exercise of the right of visitation and search, (a right which has no existence in time of peace,) in the unlawful manner in which it was attempted to be exercised.[1]

2. It was insisted, that if the search and examination had been made in a lawful and deliberate manner, it must have resulted in a conviction | of the innocence of the Portuguese ship, and her consequent immediate p. 8
liberation. As, in this case, simple reparation only was sought, and not vindictive damages, it was considered sufficient to refer to the case of the *Appollon*, where it was laid down by this Court, that, except in cases of captures *jure belli*, or on exemption expressly created by statute, even probable cause will not excuse from simple reparation.[2] But, there must, in every case, be probable cause to justify the seizure.[3]

3. But, it was further contended, that the subsequent detention and sending in of the ship for adjudication, was wholly unjustifiable, and subjected the seizor to damages. Even the harsh and unbending rules of prize law render the captors liable to costs and damages whenever the evidence of the neutrality of the ship and cargo exists on board, unless it is afterwards shown to be enemy's property, or to have been guilty of some unneutral conduct, rendering it liable to confiscation.[4] But yet there was a distinction between a right to seize and examine, and a right to capture. The right to detain and send in for adjudication, did not necessarily follow from a seizure and examination, which might have been warranted by the circumstances, but which had not resulted in showing that there was any reason | to doubt the true character of the Portuguese p. 9
vessel, and the innocence of her conduct. But, at all events, the misconduct of the master, supposing it to be ever so aggravated, could not affect the owners of the ship and cargo, whose agent he was, for ordinary civil purposes, but not so as to subject their property to loss or injury by his unlawful acts. And for the losses accruing by the detention of the ship and cargo in port, after it was satisfactorily ascertained that they could not be proceeded against by the seizors, there was still less reason to doubt the right of the claimants to recover damages.[5]

4. The charge that the Portuguese ship had attempted, or committed,

[1] 2 *Azuni*, 205. 1 *Mason's Rep.* 24. The George. [2] 9 *Wheat. Rep.* 374.
[3] 2 *Cranch's Rep.* 64. 170. 3 *Cranch's Rep.* 458.
[4] *Wheat. Capt.* 312. *Appx. Croke. Reply to Schlegal*, 62. 2 *Azuni*, 212. 1 *Dall. Rep.* 183. 2 *Wheat. Rep.* 333. The Anna Maria.
[5] 2 *Bro. Civ. & Adm. Law*, 210. 5 *Rob.* 40. The St. Juan Baptista. 4 *Rob.* 58. The Zee Star. 3 *Dall. Rep.* 333. 2 *Wheat. Rep. Appx.* 12.

a piratical aggression or restraint, within the act of Congress, was considered as negatived by the restitution, with the consent of the captors, in the Court below. Whatever might be the nature or degree of the offence meant to be defined by the act, it must be *piratical*; and all the authorities define piracy to be a robbery, or forcible depredation on the high seas; and they all concur, that a bare assault, without taking or pillaging something, does not constitute this crime.[1] If the act of Congress goes
p. 10 beyond this definition, it is not warranted | by the law of nations, and cannot give jurisdiction to the tribunals of this country over the persons and property of foreigners.

Mr. *Blake*, for the respondents, made three points:

(1.) The captors were justifiable, under all the circumstances of the case, in subduing and taking possession of the Portuguese ship.

(2.) They were justifiable in sending her in for adjudication.

(3.) There was probable cause of seizure and sending in for adjudication.

1. Even the sentence of the District Court admits that Captain Stockton was not liable to damages for the mere act of subduing and seizing the ship. She had committed a hostile and piratical aggression on a public vessel of the United States in time of peace. The learned counsel here entered into an able and elaborate argument upon the evidence, to show that the first aggression was committed by the Portuguese ship, and that it was not justified or excused by the conduct of the Alligator. It was a predetermined, deliberate, and wanton attack; not an accidental rencounter, nor the result of any mistake. It was an act of private war, and the *onus probandi* is on the claimant to show that it was authorized by the law of nations. Admitting even that the Alligator pursued the Portuguese vessel, she had an unquestionable right to approach her in time of peace; and an attempt to exercise the right
p. 11 could not be construed into | an act of hostility, or warrant the use of force to prevent it. As the ocean is the common property of all nations, every nation has a right to its free use, and no one can claim the exclusive control of a larger portion than is sufficient for the purposes of its own movements. The regulations as to keeping out of cannon shot, and sending a boat on board, are applicable only to a state of war, and to the exercise of the belligerent right of search, which, it is admitted, does not exist in time of peace. Indeed, these regulations are the creatures of conventional law, and bind those nations only between whom they are established by special treaty. But the Alligator was a public armed ship, belonging to the navy of the United States, and sent out to cruize against pirates and slave traders, under the different acts of Congress

[1] 2 *Woodes.* 140. 2 *Azuni*, 351. *Bynk. Q. J. Pub. Duponceau's transl.* 127. note. 2 *Bro. Civ. & Adm. Law*, 462. 1 *Sir L. Jenkins' Life*, &c. 91. 5 *Wheat. Rep.* 161. 3 *Wheat. Rep.* 641.

passed for the suppression of these offenders. Captain Stockton was authorized by these laws, and his instructions under them, to seize and subdue all vessels and persons offending against them, wherever they might be found. If every vessel on the ocean has a right to draw around her a magic circle, and to prevent by force the approach of all others, it is obvious that the acts of Congress must remain a dead letter, since they could not be executed without approaching sufficiently near to ascertain the probable character of the vessel. The act of heaving to, on the part of the Marianna Flora, indicated either a desire to speak the Alligator, or to get the weather gage for the purposes of annoyance; and, in either case, it was the duty | of Captain Stockton to change his p. 12
course, and overhaul the Portuguese ship. But the circumstance of the hostile guns which were soon afterwards fired from the Marianna Flora, without hoisting any national flag, made it still more imperatively his duty to approach her; and had he avoided the rencounter, he could not have justified his conduct to his government and his country. He had a right, then, to pursue and capture, founded upon the act of Congress, and his instructions. He was justified in considering the ship as having not only attempted, but as having actually committed, a piratical restraint and aggression, within the meaning of the act.

But, independent of the authority derived from this statute, he was justified in pursuing and subduing the aggressor, upon the more general grounds of natural and public law. The right of freely navigating the ocean, and of self-defence, of repelling force by force, was common to both vessels. The Alligator was not bound to decline the combat by flight. In the expressive words of Baron Puffendorf, 'in a state of nature, the aggressor hath no right, by which the other party is bound to decline his violence, rather than oppose it; and the reason why a man, under his natural condition, sometimes chooses rather to fly than fight, is not out of any favour to him who sets upon him, but because he thinks it more convenient for his own affairs to fly, *like hares, whose armour is in their feet.*'[1] | This doctrine has reference to the condition of man in p. 13
a state of nature; and such was the condition of the parties now before the Court, when upon the ocean, and waging war with each other. The *vindices injuriarum* were not there, and each party became of necessity his own avenger and judge. As to the Alligator not firing a gun in affirmance of her flag, it cannot surely be pretended that such an idle ceremony could give any additional assurance that she was what she pretended to be, or that the general law of maritime states requires any such ceremony. It may be the particular usage of Spain and Portugal, and it may have been adopted between some other nations as a part of the conventional law; but it has reference exclusively to a state of war,

[1] L. 2. c. 13. s. 14.

and is a mere regulation of the exercise of the belligerant right of visitation and search.

Still less can it be maintained that the Portuguese had reasonable grounds to suspect that the Alligator was a pirate, and had hostile designs upon his ship, and, therefore, he had a right to attack and destroy her. The analogies of the municipal law may assist to illustrate this branch of the inquiry. What degree, or what grounds of fear of bodily harm, will justify an act that may result in the destruction of human life, is, in some cases, a question of great delicacy and difficulty. By the rules of the common law, the rights of the party assailed are confined within very narrow limits. The danger must be manifest, impending, and almost unavoidable. But the writers on natural law may, perhaps,
p. 14 on this | occasion, be more properly cited; and the following passage from Puffendorf affords the fullest illustration of the principles applicable to this subject. 'Sometimes,' says he, 'a doubt has arisen whether, if one assault me, by mistake, without any evil design, but with intent to employ his force against another, I may kill him in my own defence. Grotius makes this clear in the affirmative. (*De J. B. ac P.* lib. II. c. I. s. 2.) Inasmuch as nature obliges us to maintain peace with others, it may, and ought to be presumed, that every one will fulfil this obligation, unless he give manifest evidence of contrary designs.' 'But now, (speaking of timely preparations for self-defence,) though my providing thus far for my security can be injurious to none, yet, before I can actually assault another under colour of my own defence, I must have tokens and arguments amounting to a moral certainty that he entertains a grudge against me, and has a full design of doing me a mischief, so that, unless I prevent him, I shall immediately feel his stroke. Among these tokens and signs giving me a right to make a violent assault upon another man, I must by no means reckon his bare superiority to me in strength and power. 'Tis a very gross way of philosophizing which some men have got, when they tell us, by way of advice, 'He that is able to hurt you, undoubtedly is willing, and, therefore, without further warning, down with him.' This kind of doctrine is manifestly destructive of all social
p. 15 commerce among men, and the authors commonly cited in | defence of it, either are such whose character prevents their authority, or else, in the passages alleged from them, they speak only of precaution in our dealing with those who have given us sufficient tokens of their resolution to hurt us.'[1]

The application of these principles to the case now in judgment, is too plain to require illustration, and seems to leave no doubt that the respondents are fully justified as to the act of subduing and capturing the appellant's ship.

[1] *Puffend.* l. 2. c. 5. s. 6.

The counsel also commented upon a passage from *Albericus Gentilis*, which had been relied on by the learned Judge of the District Court as supporting his decree, but which, it was contended, had been misunderstood; and, at all events, was but the opinion of a private individual against the solemn judgment of a Court of justice in a case analogous to that now in discussion.[1] |

[1] *Albericus Gentilis, Hispanicæ Advocationis*, c. 27.

Albericus Gentilis is justly regarded as one of the founders of the modern law of nations. He was born in the March of Ancona, in the year 1550, and left Italy with his father, an eminent physician, who was obliged to fly from that country on account of his religious opinions. The son afterwards established himself in England, where he obtained a chair of professor of the civil law at Oxford, in 1582, and died at London in 1608. His works are, *De Jure Belli*, in three books; *De Criminæ Lesæ Majestatis; De Nuptiis; Comment. ad. L. 3. Cod. de Professoribus et Medicis*; and the work above referred to, *Hispanicæ Advocationis*, which is a collection of opinions given by him as the counsel of Spanish claimants in the English Courts of prize, and may be considered as the earliest reports of adjudged cases of maritime law. (*Moreri, Dict.*) 'Albericus Gentilis,' says Sir James Mackintosh, 'was certainly the forerunner of Grotius. The opinion entertained, *at the time*, of the difference between them, will be seen in the following words of Zouch, the pupil and successor of Gentilis at Oxford. "He chiefly followed Albericus Gentilis, and Hugo Grotius, of whom the former justifies all his positions *by authorities of law*, the latter tried his doctrines *by the test of reason*."' *Edinb. Rev.* vol. 27. No. 53. art. 9.

Singular mutability of human opinions! Nearly all the writers cited by Gentilis are now forgotten; he himself is hardly known except by name; even Grotius is little read, and, however extensive the effects of his great work on his own age, it is now considered as resting more on the authority of the innumerable writers of every age and nation cited by him, than on original principles, or the deductions of reason.

The editor has supposed, that the following translation of the passage from Gentilis, above referred to, would not be unacceptable to the reader.

'*Concerning an English vessel which fought with a Tuscan, and was taken.*

'An English ship was captured by a Tuscan, after an engagement, and confiscated. The Florentine Judges state, as the ground of this decree, that the English ship was the aggressor, and that the Florentine acted only in necessary defence. With submission, your honours, I will reply, that your premises are void of probability, your conclusion of truth. *For instance; he is presumed the aggressor, who supposed himself injured; in such a case, where it is a question of intention, opinion is sufficient.* The Tuscan may have supposed himself injured by the *commerce* of the English with the Turks. [Therefore, the Tuscan, not the Englishman, was the aggressor.] *Again; he is presumed the aggressor who lies in wait, in arms.* Such was the case of the Tuscan, who (as appears from what he had done to other vessels of ours) was cruizing for our merchantmen in that trade. *Again; he is presumed the aggressor, who is superior in strength.* And who does not see the Tuscan vessel of war was stronger than our merchantman? Again; he is presumed the aggressor, who, being armed, is accustomed to conflicts. Does this character also suit the merchantman, or, rather, the cruizer? *Finally; he is presumed the aggressor, who, under the circumstances already stated, conquers.* And which is he? Why do we ask; the decree of condemnation declares that the Tuscan first fired twice on the Englishman.

'*Again; did not the Tuscan begin the battle?* He is considered as beginning who has provoked to the battle, to hostility; and he is considered principal in the crime, with whom the malice began, and to him, as the aggressor, are justly imputed the consequences. *And will those Judges tell me, that it is a practice and sign of amity to fire once and again?* It is the custom of a ship of war hailing another vessel, and assuming this authority. The Tuscan vessels practised this at that time, and in other cases. *Then, the defence of the English was against a claim of authority, against threats.* The object of the Tuscans was to search our ship, as appears from their transactions with others; they came, therefore, to interrupt our navigation, to intercept our commerce, as appears from what they did with others. Deeds declare the intention. The deed of the Tuscans was unlawful, if a huntsman cannot lawfully enter another man's farm without the owner's permission; if it is unlawful to injure

p. 16 2. The captors were equally justifiable in sending her in for adjudica-
p. 17 tion. It was the exercise | both of a right and a duty. Taking it for granted,
p. 18 that there was a right to subdue, and to capture, | the right to send in for adjudication follows as a corollary. The right to seize depended upon |
p. 19 the fact of the offence committed by the captured vessel. The captors had no authority to apply the law to the fact, to sit in judgment upon the case, and to inflict summary justice on the offender. Still less could the commander of a public ship be expected to assume the responsibility of suffering the offender to escape. It was apparently a piratical, or, at least, a hostile aggression against the law of nations, which had been

an enemy, in a neutral territory, and if territory in this respect differ not from jurisdiction. Neither shall the custom above alluded to (if ever any where so received) be now obtruded upon me as a law of the sea relative to the power of ships of war; for, although the custom may be admitted on the shores of the prince to whom the vessel belongs, it cannot in other seas. Nor let us regard the opinion of those customary jurists, but adhere to those who proceed on general principles. [*They* teach that] *The defence of the English was just, fearing an attack. And the bare preparation of another against one giving me a right to assault and slay him. In fact, I am not obliged to wait till I am assailed.* I have a right to commence. This is the opinion more favourable to humanity, and proved from facts on trial, and is also confirmed by all the writers. "*We must go to meet the assault,* [*say they,*] *not only that which actually exists, but that which may take place.*"

'The defence of the English was justifiable even on the behalf of the Turks, who were to suffer injury from the Tuscans in our ship. For, an injury is done to us, which is done to another in our house; and a ship is compared to a house. So, an injury done to a fellow traveller, is done to us. It was, therefore, commendable for us to defend those whom we had undertaken to carry. Nay, we ourselves were entitled to be spared, although carriers [of enemy's property, simply as such] should not be so entitled. It was still necessary for us to defend ourselves, through fear lest we should suffer, by being confounded with the Turks, and by a wish to save our own property. Thus, in a case still harder to defend, Cravetta held, when a city shut its gates on its lord, through fear of being ravaged, and for the sake of preserving its property, and in order that, with a few guilty, the remaining innocent might not be confounded.

'If, then, it was a defence of ourselves, and a just defence, the attack of the Tuscans must have been unjust. But, grant that their attack was just. Certainly, in the doubtful conflict of just attack, and just defence, every one will think the defence entitled to favour. There are all degrees of just, equitable, and favoured, and that which is more just, is to be preferred to that which is less so. *But, grant that the assault was on our side, and that it was unjust. Shall a stipulated surrender avail us nothing? They are not regarded as captured, who have surrendered, even from extreme necessity.*

'But, grant that they were captured, are persons and property captured the perquisites of the captor? On this supposition, there is a kind of war between us and the Tuscans, and this is a battle between enemies, which, therefore, must be adjudged by the public rules of war, and not those of pirates and murderers. The most learned Alciati is to the contrary, and the plainest law teaches that neither captured persons nor goods accrue to the captor.

'But, grant that captured goods do accrue to the captor; the goods, in this case, did not belong to the combatants; and the deed of these mariners must not prejudice the owners. The mariners are not to be understood to have done wrong by the order of the owners; nor the latter to have given orders otherwise than according to mercantile usage. "The owners must not suffer, although the mariners should say they had acted according to orders."

'See how, even in the liberal concessions I have made in the defence, the mariners would hardly be responsible, the owners not at all. But, since the defence of the mariners was on every principle just, what follows but that the Tuscans should restore to us, as to persons plundered, every thing taken away, with damages, costs, interest, profits, &c. to the last farthing.'

committed upon a public vessel of the United States. It is not essential to constitute the piratical restraint and depredation, which is meant to be punished by the act of Congress, that there should be an intent to rob or plunder. Any wanton attack on a vessel, on the high seas, and especially an attack with an intent to sink the vessel, and destroy the lives of the officers and crew, is clearly within the letter and the spirit of the act. If a homicide had been occasioned by this aggression, it could not be considered as justifiable or excusable, upon the principles of the criminal code of this, or any other civilized country; and not being justifiable or excusable, it would be a | case of murder, and if a case of murder, of p. 20
piratical murder. Now, if the act attempted to be done would have been piratical, the attempt also was piratical. It may, indeed, be said, that the act of Congress is broader than the rule of international law on this subject; that, by the law of nations, an attempt to commit a piracy is not a piracy; and, therefore, the detention and sending in for adjudication was unlawful. Supposing this to be so, *argumenti gratia*, still the judicial tribunals of this country are bound to protect the officer who acts under it, and in obedience to it. This very question of an apparent collision between the law of nations and a municipal ordinance, was presented to the mind of that great man who presides in the British High Court of Admiralty, in the memorable case of the orders in council, and disposed of without hesitation or difficulty, upon the plain and intelligible ground, that he could not presume the prize ordinances of his own country to be repugnant to the law of nations.[1]

But, supposing it not to be a piratical aggression, or an attempt to commit one, still it was an act of deliberate, wanton, flagrant hostility, committed against the law of nations, and the rights of this country as one of the community of nations. For such an offence there must be some punishment, and the appropriate penalty inflicted in analogous cases, is that of confiscation. Thus, in the case of the *Anne*,[2] this Court condemned, | as prize of war, enemy's property taken within neutral p. 21
jurisdiction, upon the ground, that the captured vessel had made the first attack upon the captor, and, by this act of aggression on the other belligerant, had disturbed the state of peace which is always supposed to exist in a neutral port.

3. There was probable cause, such as will exempt the captors from damages. Probable cause is, where a seizure is made under circumstances which warrant suspicion, and upon evidence less than that which would justify condemnation.[3] No case can be shown where a Court of the law of nations has decreed damages merely for bringing in for adjudication, if the original seizure was justifiable, unless under peculiar circumstances

[1] *Edw. Adm. Rep.* 311. The Fox.
[2] 3 *Wheat. Rep.* 435.
[3] 7 *Cranch's Rep.* 348. Locke v. United States.

not affecting the principle, or its application to the present case. The learned counsel here cited and classified all the cases to be found in the English books, where damages had been given or refused; and deduced from them the general inference, that wherever there is probable cause for the original seizure, the captors are only liable to make simple restitution, even if upon adjudication it turns out that their suspicions were groundless.[1] |

[1] The three classes of cases affecting this question, are, (1.) Where *damages* have been given or refused on restitution. (2.) Where *compensation* has been given, or refused, *the prize being lost in the hands of the captors.* (3.) Where, although restitution was decreed, *the captors have been allowed their costs and expenses.*

I. In the *Corier Maritimo,* (1 *Rob.* 287.) demurrage was given for unnecessary detention, and unjustifiable delay in proceeding to adjudication. In the *Zee Star,* (4 *Rob.* 71.) demurrage was given to the claimants, and costs and expenses refused to the captors, (which are usually allowed even on restitution,) for improper delay in proceeding to adjudication. In the *Triton,* (4 *Rob.* 78.) costs and damages were given to the claimant of the goods, and demurrage for the ship, for seizure on an insufficient ground. In the *Madonna del Burso,* (4 *Rob.* 169.) all the circumstances concurred of a seizure originally unjustifiable, protracted detention, and improper delay in proceeding to adjudication: costs and damages were given. The *Peacock,* (4 *Rob.* 185.) was the case of an unjustifiable detention of the prize vessel, carried into Lisbon, and delay in bringing her home to England for adjudication. The *Wilhelmsburg,* (5 *Rob.* 143.) demurrage allowed, and the expenses of the application given against the captors, for loss arising from his not bringing the captured vessel to *the most convenient port for adjudication,* within the meaning of the prize act. In the *Zacheman,* (5 *Rob.* 152.) which was a mistake as to the law of contraband under the Swedish treaty, and the seizure was pronounced perfectly justifiable, demurrage was allowed for unreasonable delay. The *Anna,* (5 *Rob.* 332.) was a case of restitution, with costs and damages, for a violation of the neutral territory of the United States. The seizure itself was pronounced to be unjustifiable, and costs and damages were given, because the prize ship was improperly brought from the mouth of the Mississippi to England for adjudication, instead of being carried into one of the West India islands. In the *Washington,* (6 *Rob.* 275.) damages were given for bringing the vessel to an inconvenient port. The *Acteon* (2 *Dods.* 48.) was an American ship sailing under a license, unlawfully seized and burnt. The *St. Antonio* (*Acton,* 113.) was sailing under a license to enter the port of Holland, but was seized under suspicion of an intention to go to a French port. On bringing in, the captors offered to liberate on payment of their expenses, but afterwards retracted, and went on to adjudication. There was a decree of restitution, and the claimants appealed to the Lords for costs and damages; the appeal was rejected, and the claimants condemned to pay the costs of the appeal. In the *Catharina Elizabeth,* (*Acton,* 309.) costs and damages were given by the Lords for carrying the captured vessel to an inconvenient port. In the *Louis,* (2 *Dods.* 210.) damages were refused by Sir W. Scott, although he held the seizure clearly illegal, it being a case of the first impression.

II. The rule on the subject of compelling the captors to proceed to adjudication, where the property is lost in their hands, is, that where the seizure is unjustifiable, the captor is answerable for every loss or damage. In cases of justifiable seizure, he is responsible for due diligence only, and is held to simple restitution in value.

The *Carolina,* (4 *Rob.* 255.) was a neutral ship which had been employed in carrying French troops to Egypt, and was taken coming away. Had she been taken in actual *delicto,* she would have been liable to condemnation. The captors were held exempt, not only from costs and damages, but from restitution in value, the ship having been lost while in their possession by stress of weather. In the *William,* (6 *Rob.* 316.) the original seizure was held justifiable, but restitution in value was decreed for a loss occasioned by not taking a pilot on board, but no damages were given. In the *Der Mohr,* (3 *Rob.* 129.) the original seizure was considered as justifiable, but the captors were held responsible to make restitution in value (not for costs and damages) on account of the loss of the vessel by the ignorance and wilfulness of the prize master.

III. In general, the captors are allowed their expenses and costs on restitution,

As to the decision of this Court in *Murray* v. *The Charming Betsey*,[1] p. 22
it is affirmed by Mr. | Dallas, arguendo, as a general principle of maritime p. 23
law, that probable cause will justify a marine seizure, is not denied by the opposite counsel, and is impliedly conceded by the Court in its judgment, the whole scope of which goes upon | an inference of fact from p. 24
the evidence, that there was not probable cause of seizure, showing, that if there had been, damages would not have been given. In *Little* v. *Bareme*,[2] the Court did not deem it necessary to determine whether the probable cause afforded by the conduct of the captured vessel to suspect her of being an American, would exempt the captors from damages, because it was of opinion that had she been so, the seizure would still not have been warranted by the law. And the case of *Maley* v. *Shattuck*,[3] was the application of the ordinary principle of the Prize Court, that if the seizure is without probable cause, the captors are liable to make restitution, with costs and damages, even if the property be lost without their fault; evidently implying, that if there had been probable cause for the original seizure, they would not have been so liable.

Mr. *Webster*, on the same side, entered into a minute examination of the evidence, in order to show that the party, who was in fact the wrong doer, and the aggressor, now appeared before the Court in the character of a plaintiff, seeking redress for a supposed injury done to himself. It had been said, that the owners of the ship, and of the cargo, were not to be held responsible for the misconduct of the master. There were two answers to this objection; (1.) That it was not the captors who were seeking to | punish the owners, but the owners who were seeking compen- p. 25
sation against the captors for the consequences of the misconduct of their own agent. (2.) That the universal principle, applied by Courts administering the law of nations, was to consider the thing taken *in delicto*, as responsible, whether it was the property of the master, or of others. In cases of blockade, of contraband, of carrying enemy's property with false papers, of resistance to visitation and search, he is considered as the agent of the owner both of ship and cargo. So, also, the revenue laws, from the necessity of the case, regard him in that character, and subject the vessel and goods under his control to confiscation for his unlawful acts. In every case, until the innocent are separated from the guilty, until examination and regular adjudication can be had, the law is compelled to regard the ship, and every thing on board, as belonging to the master.

whenever there is probable cause of capture. The *Imina*, (3 *Rob.* 167.) The *Principe*, (*Edw.* 70.) The only exceptions to this rule are where there has been some negligence or misconduct on the part of the captors. There are a great number of cases on this head, which it was deemed unnecessary to cite.

[1] 2 *Cranch's Rep.* 116. 122.
[2] 2 *Cranch's Rep.* 169.
[3] 3 *Cranch's Rep.* 458.

It had also been contended, that though the original seizure might be justifiable, the captors were liable in costs and damages for not releasing the vessel after she was subdued and seized. But it was not pretended that Captain Stockton had authority to punish her himself; and, therefore, unless the Portuguese ship had, notwithstanding all that had happened, a clear right to go off with impunity, he had an unquestionable right to send her in for adjudication. If she had a right to pursue her voyage, she would have had the same right if the consequences of
p. 26 her aggression had been ever so calamitous; if she had | crippled the Alligator, and destroyed half her crew. The actual consequences being less serious, do not affect the right, though they may the exercise of discretion. But we have nothing to do here with the question of military discretion. The captured vessel had made war. She had committed what was, *prima facie*, a piratical restraint and depredation. If unexplained, it was piracy. Whether it could be satisfactorily explained, or excused, was a question to be decided by the civil tribunals. It was not too much to say, that the captors had here something of a belligerant right. The act of Congress was not a mere municipal law; it was a prize ordinance. The seizure was not a mere municipal seizure. War against pirates existed, and the act was intended to define who should be treated as pirates. And, even if the Court should *now* be of opinion, that the captured vessel ought not, under all the circumstances, to be sent in, still the question recurs, whether Captain Stockton might not, *at that time*, have thought otherwise. He was called on, suddenly, to decide an act on a question full of difficulties, and which has occasioned no little embarrassment to the civil tribunals, with all the advantages of a deliberate examination. Even with these advantages, the learned Judges of the Courts below have differed in their judgments upon it; and yet, it is now contended, that this naval commander was bound to be better instructed in the laws than those whose peculiar duty it is to study and
p. 27 expound them. Upon these grounds it was, that Sir W. Scott | determined, in the case of the *Louis*,[1] that it being a case *primæ impressionis*, the captors were exempt from costs and damages, although the Court was clearly of opinion, that the seizure itself was unjustifiable, a right of search not existing in time of peace. A doubt respecting the true construction of the law, is as reasonable a ground for seizure, as a doubt respecting the fact.[2] But, here was doubt respecting both fact and law, and that doubt is not yet cleared up. The capture was made in repelling what appeared, at the time, to be an act of piratical aggression. It has turned out not to be so, after a judicial examination. But, the question is, what it appeared to be *recenti facto*. It cannot be maintained, that an habitual course of piratical depredation is necessary to constitute the

[1] 2 *Dods. Rep.* 210. 264.

[2] 5 *Cranch's Rep.* 311.

offence of piracy. A single act of piratical aggression, stimulated by revenge, or national prejudice, or wanton cruelty, would be sufficient. The act of Congress evidently supposes it, and is in conformity with the public law.

It had also been argued, that this was a municipal seizure, and that the vessel having been restored without a certificate of probable cause, costs and damages followed as a matter of course. But, it was insisted, that municipal seizures are for offences within our own territorial jurisdiction, or by our own citizens elsewhere. Here, the proceedings are under the law of nations; and, if found guilty, the property would be condemned, | not for a municipal offence, but as prize, and distributed as p. 28
prize. And, even if it had been a municipal seizure, it could not be admitted that such consequences would necessarily follow in every case, without regard to its circumstances. The true principle applicable to seizures of every kind was, that the party having a right to cruize, and bring in some vessels, if others so conduct as to give themselves the character of those who are liable to capture, they would be entitled to nothing but simple restitution. This is laid down in clear and satisfactory terms by Sir W. Scott. 'The natural rule is, that if the party has been unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before deprivation took place; technically speaking, he is entitled to restitution *with costs and damages*. This is the general rule; but, like all other general rules, it must be subject to modifications. If, for instance, any circumstances appear, which show that the suffering party has himself furnished occasion for the capture; if he has, by his own conduct, in some degree contributed to the loss; then he is entitled to a somewhat less degree of compensation, to what is technically called *simple restitution*.' [1]

Mr. *Emmett*, for the appellants, in reply, argued, that the second count in the libel filed in the Circuit Court, charging a hostile aggression, was inadmissible, as the original subject matter | of the suit was originally p. 29
cognizable in the District Court, (where the ship and cargo had been acquitted from the original charge of a *piratical* aggression,) and to allow such an amendment would be to institute an original, and not an appellate proceeding, in the Circuit Court.

The appellants were entitled to damages as claimed. The capturing vessel derived her right under the municipal law. The piracy alluded to in the act of Congress is sea robbery. It is an act to protect commerce; and the history of the times shows, that the great evil to be remedied was the system of depredations on the ocean. They were, indeed, frequently accompanied with murder, and various other enormities. But these were only subservient to the system of plunder, and intended only

[1] The Acteon, 2 *Dods. Rep.* 48.

to facilitate or conceal the crimes of the offenders. The piracy referred to is, that by the law of nations, and not by any peculiar law of the United States.[1] And, even if our statutory piracy had been contemplated in this act, it would not apply to the present case. The Crimes Act of 1790, defines the piracy created by that statute to be 'murder, or robbery, or any other offence, which, if committed within the body of a county,
p. 30 would, by the laws of the United States, be punishable with | death.' Now, as the firing by the Portuguese did no mischief, no offence was committed, which, if committed on land, would be punishable with death. Besides, it has been determined, that this section of the Crimes Act does not extend to foreign vessels.[2] For the purposes of this case, then, if not for the purposes of every case, it may be assumed, that the piratical aggression mentioned in the act of the 3d of March, 1819, c. 76. must be with intent to rob or plunder. Nor can the act affect the antecedent rights of other nations. It did not, and could not, create a state of war. Pirates are, indeed, called *hostes humani generis;* but the use of such metaphorical language is often calculated to mislead, and to confound our ideas of legal rights. They are, indeed, public offenders, like the highway robber, but they are not public enemies so as to give those who cruize against them any of the rights of war in respect to the subjects of friendly states who are not involved in their guilt. The act could not give to our own ships the right of visitation and search, or any other belligerant rights, so far as respects foreign nations. It could not affect the pre-existing right of Portuguese subjects to maintain for themselves the privileges of a state of peace. Its utmost effect would be to impose on vessels of this country the obligation to submit to examination, and the seizures it authorizes must be regarded as strictly municipal. The commissioned vessel must, therefore, act on credible information, or on
p. 31 evidence it has of acts of piracy. A claim to examine | or detain vessels of another nation on suspicion, without information or evidence, would be as large as the belligerant right of search, though under another name. If the commissioned vessel acts against a foreign vessel, it acts at its own peril, and (more especially when it acts without information or evidence) must abide the consequences as to damages if it has acted erroneously. In captures *jure belli*, if there be probable cause, the captors are entitled, as of right, to an exemption from damages; but, in case of a municipal seizure, there must be some provision of positive law creating and defining the exemption. The party who seizes does it at his peril; if condemnation follows, he is justified; if an acquittal, then he must make compensation, unless he can protect himself under some statute.[3]

[1] United States v. Smith, 5 *Wheat. Rep.* 153. United States v. The Pirates, 5 *Wheat. Rep.* 184.

[2] United States v. Palmer, 3 *Wheat. Rep.* 610. United States v. Clintock, 5 *Wheat. Rep.* 144. The Apollon, 9 *Wheat. Rep.* 372.

It has been said, that under this construction, the act would become a dead letter. The same was said in the case of the *Louis*, and the answer of Sir W. Scott to the objection is conclusive and pertinent to the present case.

But the objection is unfounded. The dangerous pirates are, for the most part, not difficult to distinguish. Their haunts, their habits, their appearance, point them out ; and though the commissioned officer acts at his own risk, yet if he act on those indicia, and on information and evidence, and stays his hand where he can find no trace or evidence of guilt, he incurs no real danger | of being liable to damages ; and, in any p. 32
event, may rely on the justice and liberality of his own government for protection. This is also the doctrine of the municipal law in analogous cases on land, both criminal and revenue proceedings.

One of the privileges of a state of peace, which the Portuguese have still a right to maintain for themselves, is the benefit of the principle, that on the high seas the merchantman is equal to the man-of-war. Each may protect itself according to its sense of expediency and necessity, and resist the doing of any thing by the other, *as a right*, which is not a right. If the man-of-war has no right to examine, the merchantman has a right to resist that examination. Even in war, a vessel navigating the ocean may, to a certain extent, draw a line of jurisdiction around itself. This is proved by the restrictions put on the right of search. It is said, indeed, that these are the result of treaty stipulations. But they are the result of a true interpretation of the law of nations, and have been recognised in treaties, because England had practically violated the right. *A fortiori*, in time of peace may every vessel draw a circle of jurisdiction around itself, and resist the exercise of that search and visitation which is not lawful in time of peace. It is upon this ground that Sir W. Scott held the doctrine, that if a neutral resist search, not knowing of the existence of a war, it is no ground of condemnation ; [1] and that still more recently he has | determined that the right of visitation p. 33
and search does not exist, and cannot be exercised in time of peace.[2] Every ship navigating the ocean in time of peace may appropriate to her temporary use so much of it as is necessary to her protection, consulting the equal rights of others. It is a right that will lie dormant, and never be exercised except upon real apprehension. When there is no apprehension of danger, the consent to approach will never be withheld. But the right to approach *in invitum* can never exist ; and, both parties being independent and equal, each party is to judge for himself as to the extent and reality of that danger. Unless this exclusive right of judgment is maintained, the approach of pirates could never be prevented, who frequently assume the flag of public ships, and fall upon their victims under this disguise.

[1] The St. Juan Baptista, 5 *Rob. Rep.* 36. [2] The Louis, 2 *Dods. Rep.* 210.

The learned counsel here argued upon the evidence to show, that upon a just application of these principles, the conduct of the Marianna Flora was perfectly justifiable. The first fault was committed by the Alligator in chasing, and not affirming her flag with a gun. This is the law of nations, and recognised as such by every maritime nation on the continent of Europe. The language of *Azuni* on this subject is peculiarly appropriate to the present case. He says, ' the fear of meeting with a pirate,
p. 34 and being the dupe of deceitful appearances, is the reason why | no credit is given to the *flag* of a vessel, *though a ship of war.*' [1] Had the flag been affirmed, in this instance, in the manner to which the Portuguese are accustomed, they would not have resisted the attempt to approach their vessel, and all the present consequences would have been avoided.

They might also have been avoided, by that deliberate and impartial examination, which it was Captain Stockton's duty to make, before he decided on sending in the ship for adjudication. It would have been his duty, even in war, to examine faithfully the ship's papers, and pay due respect to the evidence produced.[2] But, it is said, that the usual documentary evidence would prove nothing, since it was not a question of proprietary interest or neutral character. The answer is, that the ship's papers would have shown, that the *vessel*, whom he treated as a pirate, was an innocent merchantman ; and that the *cargo* was not liable, by the act, to confiscation, even if the vessel had been guilty of a piratical aggression. The 4th section of the act only subjects the *vessel or boat* to confiscation, and even that must be understood with the implication that they are the property of the wrong doers ; for the master can never be considered as the owner even of the ship, so as to subject it to forfeiture for his criminal acts, much less can he be considered as the owner
p. 35 of the cargo for such a purpose. | In the words of this Court, it may be said, that, ' however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the legislature has authority and jurisdiction.' [3]

Nor can it be maintained that here was an act of private unauthorized war committed by the Portuguese, which, being a violation of the law of nations, would subject the vessel, if taken *in delicto*, to confiscation. Private war never gives the right of capture and confiscation.[4] That belongs to public war alone. In time of war, every violation of belligerant rights is followed by condemnation, because it is considered as evidence of enemy's property, which, by the laws of war, is transferred to the capturing power. But, in time of peace, to make every violation of the

[1] 2 *Azuni*, 204. 602. c. 3. § 3.
[2] The Anna Maria, 2 *Wheat. Rep.* 327. 2 *Azuni*, 212. § 8.
[3] The Apollon, 9 *Wheat. Rep.* 370. [4] *Stewart's Vice Adm. Rep.* 301.

law of nations, however slight, produce the condemnation of property, however valuable, and belonging to innocent persons, would reduce the law of nations to the sweeping severity of Draco's code.

In this case, the sending in for adjudication has been sought to be justified by hypothetical reasoning, grounded upon the supposition that lives might have been lost; and a learned discussion of the municipal law of homicide was entered into, to show, that if any of the Alligator's crew | had been killed, it would have been murder; and, then it is asked, p. 36 whether it would not have been Captain Stockton's duty to send in for trial, for what would have been clearly piracy. But we are to deal with the case as we find it. No lives were, in fact, lost; no injury done to the vessel. It was nothing but the offence of firing, and in self-defence, against a vessel that turned out to be a public ship of war, but which did not at first manifest her character in the mode to which the Portuguese had been accustomed. Was it possible to suppose that such an act could produce the confiscation of the cargo belonging to innocent owners, or of the ship, the owner of which was equally innocent? It was at most a marine trespass, cognizable in the Courts of the offender, because it was not a case of war, nor to be determined by the law of war; or if there were a doubt whether there was any thing of national insult in it, it might be a fit subject to be represented to this government for diplomatic discussion. But, after the ship and cargo were brought in, and it was ascertained that she could not be subjected to confiscation, why were they detained and proceeded against as if captured *jure belli?* Here are a series of wrongs, for which they who suffer damage must look for compensation to him whom the law considers as the wrong doer, although many of them were the acts of his agents, and done in his absence. They do not seek vindictive damages, but simple compensation only. The long list of cases which | has been arrayed against us cannot furnish a rule p. 37 for a seizure, which was not made *jure belli*, but which (if to be justified at all) must be considered as having been made in execution of a municipal statute. Will probable cause, even if it existed, furnish a defence in such a case? That is not the law of *Hoyt* v. *Gelston*,[1] which was a seizure under an act of Congress, and where there was probable cause, though it was not certified by the Court according to the statute. Is it the law of any case where the wrong doer acts under municipal laws on his own responsibility? Is it the law to be collected from the cases of the *Acteon*,[2] of *Murray* v. *The Charming Betsey*,[3] of *Little* v. *Bareme*,[4] of the *Jeune Eugenie*,[5] or even of the *Louis?*[6] In the last case, indeed, damages were refused, because it was *primæ impressionis*—a case of some doubt and

[1] 13 *Johns. Rep.* 141. 561. 3 *Wheat. Rep.* 246.
[2] 2 *Dods. Rep.* 48. 52.
[3] 2 *Cranch's Rep.* 125.
[4] 2 *Cranch's Rep.* 170.
[5] 2 *Mason's Rep.* 409. 439.
[6] 2 *Dods. Rep.* 210.

difficulty as to the new construction of the law of nations, and the application of the French decree respecting the slave trade, and the parties seeking damages were stained with crime. But here the law is old, and well settled; and nothing but the offence is of novel impression. The parties are innocent; and the very novelty of the offence ought more certainly to secure its punishment.

March 20th.

p. 38 Mr. Justice STORY delivered the opinion of the | Court, and after stating the pleadings, proceeded as follows:

An objection, which is preliminary in its nature, has been taken to the admissibility of this new count to the libel, filed in the Circuit Court, upon the ground, that the original subject matter was exclusively cognizable in the District Court; and to allow this amendment would be to institute an original, and not an appellate inquiry in the Circuit Court. But the objection itself is founded on a mistaken view of the rights and authorities of appellate Courts of admiralty. It is the common usage, and admitted doctrine of such Courts, to permit the parties, upon the appeal, to introduce new allegations, and new proofs, *non allegata allegare, et non probata probare.* The Courts of the United States, in the exercise of appellate jurisdiction in admiralty causes, are, by law, authorized to proceed according to the course of proceedings in Admiralty Courts. It has been the constant habit of the Circuit Courts, to allow amendments of this nature in cases where public justice, and the substantial merits, required them; and this practice has not only been incidentally sanctioned in this Court; but on various occasions in the exercise of its own appellate jurisdiction, it has remanded causes to the Circuit Court, with directions to allow new counts to be filed. We may, then, dismiss any farther discussion of this objection, and proceed to the main questions
p. 39 in controversy. [Here the learned judge recapitulated | the facts of the case as they have been before stated.]

In considering the circumstances, the Court has no difficulty in deciding, that this is not a case of a piratical aggression, in the sense of the act of Congress. The Portuguese ship, though armed, was so for a purely defensive mercantile purpose. She was bound homewards with a valuable cargo on board, and could have no motive to engage in any piratical act or enterprise. It is true, that she made a meditated, and, in a sense, a hostile attack, upon the Alligator, with the avowed intention of repelling her approach, or of crippling or destroying her. But, there is no reason to doubt, that this attack was not made with a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property. It was done upon a mistake of the facts, under the notion of just self-defence, against what the master very imprudently deemed

a piratical cruizer. The combat was, therefore, a combat on mutual misapprehension; and it ended without any of those calamitous consequences to life which might have brought very painful considerations before the Court.

It has, indeed, been argued at the bar, that even if this attack had been a piratical aggression, it would not have justified the capture and sending in of the ship for adjudication, because foreign ships are not to be governed by our municipal regulations. But the act of Congress is decisive on this subject. It not only authorizes a capture, but a condemnation in our Courts, for | such aggressions; and whatever may be p. 40
the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt that Courts of justice are bound to obey and administer them.

The other count, which seeks condemnation on the ground of an asserted hostile aggression, admits of a similar answer. It proceeds upon the principle, that, for gross violations of the law of nations on the high seas, the penalty of confiscation may be properly inflicted upon the offending property. Supposing the general rule to be so in ordinary cases of property taken *in delicto*, it is not, therefore, to be admitted, that every offence, however small, however done under a mistake of rights, or for purposes wholly defensive, is to be visited with such harsh punishments. Whatever may be the case, where a gross, fraudulent, and unprovoked attack, is made by one vessel upon another upon the sea, which is attended with grievous loss or injury, such effects are not to be attributed to lighter faults, or common negligence. It may be just, in such cases, to award to the injured party full compensation for his actual loss and damage; but the infliction of any forfeiture beyond this does not seem to be pressed by any considerations derived from public law.

Pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation; for they are, in truth, the common enemies of all mankind, and, as such, are liable to the extreme rights of war. And a piratical | aggression by an armed vessel sailing under p. 41
the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations. But every hostile attack, in a time of peace, is not necessarily piratical. It may be by mistake, or in necessary self-defence, or to repel a supposed meditated attack by pirates. It may be justifiable, and then no blame attaches to the act; or, it may be without just excuse, and then it carries responsibility in damages. If it proceed farther, if it be an attack from revenge and malignity, from gross abuse of power, and a settled purpose of mischief, it then assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer.

These latter ingredients are entirely wanting in the case before us; and, therefore, if the question of forfeiture were now in judgment, we should have no doubt, either upon the act of Congress, or the general law, that it ought not to be enforced.

But, in the present posture of this cause, the libellants are no longer plaintiffs. The claimants interpose for damages in their turn, and have assumed the character of actors. They contend that they are entitled to damages, first, because the conduct of Lieutenant Stockton, in the approach and seizure of the Marianna Flora, was unjustifiable; and, secondly, because, at all events, the subsequent sending her in for adjudication was without any reasonable cause. |

p. 42 In considering these points, it is necessary to ascertain what are the rights and duties of armed, and other ships, navigating the ocean in time of peace. It is admitted, that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerant right, allowed by the general consent of nations in time of war, and limited to those occasions. It is true, that it has been held in the Courts of this country, that American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may, afterwards, be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but, whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, *sic utere tuo, ut non alienum lædas.*

p. 43 It has been argued, that no ship has a right to | approach another at sea; and that every ship has a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach.

This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations within cannon shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has

never been successfully asserted beyond it. Every vessel undoubtedly has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognised, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers ; and, hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war sailing, as in the present case, under the authority of their government, to arrest pirates, and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right seems | indispensable for p. 44
the fair and discreet exercise of their authority ; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is as clear, that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety ; but, at the same time, she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers ; either as to delay, or the progress or course of her voyage ; but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. These principles seem to us the natural result of the common duties and rights of nations navigating the ocean in time of peace. Such a state of things carries with it very different obligations and responsibilities from those which belong to public war, and is not to be confounded with it.

The first inquiry, then, is, whether the conduct of Lieutenant Stockton was, under all the circumstances preceding and attending the combat, justifiable. There is no pretence to say that he committed the first aggression. That, beyond all question, was on the part of the Marianna Flora ; and her firing was persisted in after the Alligator had hoisted her national flag, and, of | course, held out a signal of her real pacific p. 45
character. What, then, is the excuse for this hostile attack ? Was it occasioned by any default or misconduct on the part of the Alligator ? It is said, that the Alligator had no right to approach the Marianna Flora, and that the mere fact of approach authorized the attack. This is what the Court feels itself bound to deny. Lieutenant Stockton, with a view to the objects of his cruize, had just as unquestionable a right to use the ocean, as the Portuguese ship had ; and his right of approach was just

as perfect as her right of flight. But, in point of fact, Lieutenant Stockton's approach was not from mere motives of public service, but was occasioned by the acts of the Marianna Flora. He was steering on a course which must, in a short time, have carried him far away from her. She lay to, and showed a signal ordinarily indicative of distress. It was so understood, and, from motives of humanity, the course was changed, in order to afford the necessary relief. There is not a pretence in the whole evidence, that the lying to was not voluntary, and was not an invitation of some sort. The whole reasoning on the part of the claimants is, that it was for the purpose of meeting a supposed enemy by day light, and, in this way, to avoid the difficulties of an engagement in the night. But how was this to be known on board of the Alligator? How was it to be known that she was a Portuguese ship, or that she took the Alligator for a pirate, or that her object in laying to was a defensive operation? When the vessels |
p. 46 were within reach of each other, the first salutation from the ship was a shot fired ahead, and, at the same time, no national flag appeared at the mast-head. The ship was armed, appeared full of men, and, from her manœuvres, almost necessarily led to the supposition, that her previous conduct was a decoy, and that she was either a piratical vessel, or, at least, in possession of pirates. Under such circumstances, with hostilities already proclaimed, Lieutenant Stockton was certainly not bound to retreat; and, upon his advance, other guns, loaded with shot, were fired, for the express purpose of destruction. It was, then, a case of open, meditated hostility, and this, too, without any national flag displayed by the Portuguese ship, which might tend to correct the error, for she never hoisted her flag until the surrender. What, then, was Lieutenant Stockton's duty? In our view it was plain; it was to oppose force to force, to attack and to subdue the vessel thus prosecuting unauthorized warfare upon his schooner and crew. In taking, therefore, the readiest means to accomplish the object, he acted, in our opinion, with entire legal propriety. He was not bound to fly, or to wait until he was crippled. His was not a case of mere remote danger, but of imminent, pressing, and present danger. He had the flag of his country to maintain, and the rights of his cruizer to vindicate. To have hesitated in what his duty to his government called for on such an occasion, would have been
p. 47 to betray (what no honourable | officer could be supposed to indulge) an indifference to its dignity and sovereignty.

But, it is argued, that Lieutenant Stockton was bound to have affirmed his national flag by an appropriate gun; that this is a customary observance at sea, and is universally understood as indispensable to prevent mistakes and misadventures; and that the omission was such a default on his part, as places him *in delicto* as to all the subsequent transactions. This imputation certainly comes with no extraordinary grace from the

party by whom it is now asserted. If such an observance be usual and necessary, why was it not complied with on the part of the Marianna Flora? Her commander asserts, that by the laws of his own country, as well as those of France and Spain, this is a known and positive obligation on all armed vessels, which they are not at liberty to disregard. Upon what ground, then, can he claim an exemption from performing it? Upon what ground can he set up as a default in another, that which he has wholly omitted to do on his own part? His own duty was clear, and pointed out; and yet he makes that a matter of complaint against the other side, which was confessedly a primary default in himself. He not only did not hoist or affirm his flag in the first instance, but repeatedly fired at his adversary with hostile intentions, without exhibiting his own national character at all. He left, therefore, according to his own view of the law, his own duty unperformed, and fortified, as against himself, the very inference, that his ship | might properly be deemed, under such p. 48
circumstances, a piratical cruizer.

But, we are not disposed to admit, that there exists any such universal rule or obligation of an affirming gun, as has been suggested at the bar. It may be the law of the maritime states of the European continent already alluded to, founded in their own usages or positive regulations. But, it does not hence follow, that it is binding upon all other nations. It was admitted, at the argument, that the English practice is otherwise; and, surely, as a maritime power, England deserves to be listened to with as much respect, on such a point, as any other nation. It was justly inferred, that the practice of America is conformable to that of England; and the absence of any counter proof on the record, is almost of itself decisive. Such, however, as the practice is, even among the continental nations of Europe, it is a practice adopted with reference to a state of war, rather than peace. It may be a useful precaution to prevent conflicts between neutrals, and allies, and belligerants, and even between armed ships of the same nation. But the very necessity of the precaution in time of war arises from circumstances, which do not ordinarily occur in time of general peace. Assuming, therefore, that the ceremony might be salutary and proper in periods of war, and suitable to its exigencies, it by no means follows, that it is justly to be insisted on at the peril of costs and damages in peace. In any view, therefore, we do not think this omission can avail the claimants. |

Again; it is argued, that there is a general obligation upon armed p. 49
ships, in exercising the right of visitation and search, to keep at a distance, out of cannon shot, and to demean themselves in such a manner as not to endanger neutrals. And this objection, it is added, has been specially provided for, and enforced by the stipulations of many of our own treaties with foreign powers. It might be a decisive answer to this argument,

that, here, no right of visitation and search was attempted to be exercised. Lieutenant Stockton did not claim to be a belligerant, entitled to search neutrals on the ocean. His commission was for other objects. He did not approach or subdue the Marianna Flora, in order to compel her to submit to his search, but with other motives. He took possession of her, not because she resisted the right of search, but because she attacked him in a hostile manner, without any reasonable cause or provocation.

Doubtless, the obligation of treaties is to be observed with entire good faith, and scrupulous care. But, stipulations in treaties having sole reference to the exercise of the rights of belligerants in time of war, cannot, upon any reasonable principles of construction, be applied to govern cases exclusively of another nature, and belonging to a state of peace. Another consideration, quite sufficient to establish that such stipulations cannot be applied in aid of the present case, is, that whatever may be our duties
p. 50 to other nations, we have no such treaty subsisting with | Portugal. It will scarcely be pretended, that we are bound to Portugal by stipulations to which she is no party, and by which she incurs no correspondent obligation.

Upon the whole, we are of opinion, that the conduct of Lieutenant Stockton, in approaching, and, ultimately, in subduing the Marianna Flora, was entirely justifiable. The first wrong was done by her, and his own subsequent acts were a just defence and vindication of the rights and honour of his country.

The next inquiry is, whether the act of sending in the Marianna Flora for adjudication, was, under all the circumstances, unjustifiable, so as to carry with it responsibility in damages.

It is argued, that, upon examination of the ship's papers, the crew, and the cargo, it must clearly have appeared, that the ship was a merchant ship bound on a lawful voyage, and not a piratical cruizer. This state of the case must be admitted to have been apparent. But the real difficulty is of another sort. Her papers, and cargo, and destination, could give no information of the nature of the attack made upon the Alligator. However hostile, malignant, or even piratical, the aggression might be, the papers could shed no light upon the subject. The owners of the cargo, and the owners of the ship, (so far at least as their duties and responsibilities were not bound up by the acts of the master, as their agent,) might be innocent ; the voyage might be of a purely mercantile character, and yet,
p. 51 acts of aggression might be committed, | which might bring the case completely within the act of Congress, or of the general law of nations, as a gross and violent injury, calling for ample redress. The real duty imposed upon Lieutenant Stockton was, not to examine the papers, unless so far as they might explain doubtful circumstances, but to ascertain the nature, object, and intent, of the attack upon his vessel. He was

bound to exercise an honest and fair discretion on the subject, and to obtain such explanations as might guide his judgment. What was the excuse offered for the attack upon him? It was not that the guns were fired by mistake or accident. They were admitted to have been by authority and design. They were fired after his own flag was displayed, and with the express intention of disabling the vessel and destroying the crew. The only excuse offered for this unjustifiable act was, that the commander entertained a fear that the Alligator was a pirate. But, such a fear, unauthorized by any acts on the other side, was no excuse for a wrong which might have led to the most fatal consequences. If the Alligator had been seriously injured, or any of her crew had been killed, no doubt could exist, that, under such circumstances, the ship ought to have been sent in for adjudication, to enforce redress, and, also, to administer, if necessary, punishment. The attack was not the less inexcusable because the consequences were not as injurious as the master intended.

It is a different thing to sit in judgment upon this case, after full legal investigations, aided by | the regular evidence of all parties, and to draw p. 52
conclusions at sea, with very imperfect means of ascertaining facts and principles, which ought to direct the judgment. It would be a harsh judgment to declare, that an officer charged with high and responsible duties on the part of his government, should exercise the discretion intrusted to him at the peril of damages, because a Court of law might ultimately decide, that he might well have exercised that discretion another way. If Lieutenant Stockton had acted with gross negligence or malignity, and with a wanton abuse of power, there might be strong grounds on which to rest this claim of damages. But, it is conceded on all sides, and in this opinion the Court concurs, that he acted with honourable motives, and from a sense of duty to his government. He thought the aggression was piratical, and that it was an indignity to the national flag, utterly inexcusable. The view now taken by this Court, in respect to the whole case, upon a full examination of all the facts, is certainly somewhat different. It leads us to say, that Lieutenant Stockton might, without justly incurring the displeasure of his government, have released the ship, not because she had done no wrong, but because the wrong was not of such a nature as called for vindictive redress.

But, the question upon which damages must depend, is not whether he *might* not have released the ship, but, whether he was, at all events, *bound* so to do; and whether that obligation | was so imperative, that the p. 53
omission ought to be visited with damages.

We are, then, to consider the real difficulties of Lieutenant Stockton's situation. An attack had been made upon a national ship under his command without cause. It was a hostile act, an indignity to the nation,

and a trespass upon its rights and sovereignty. It was not an accidental, but a meditated act; not necessarily carrying its own excuse along with it, but susceptible of different interpretations. It was not an affair in which he was at liberty to consult his own wishes or honour merely, although a brave and distinguished officer might naturally feel some solicitude to preserve his high reputation untarnished in the eyes of his government. He was bound to look to the rights of his country. He might well hesitate in assuming the arbitration of national wrongs. He might well feel a scrupulous delicacy in undertaking to waive any claim which the government had authority to enforce, or to defeat any redress which it might choose to seek, or to prevent any inquiries which, through its established tribunals, it might think fit to institute, in respect to his conduct, or that of the offending vessel. Considerations of this nature could not but weigh heavily upon the mind of a gallant officer; and they are not unfit to be entertained by this Court in forming its own judgment.

It is, also, farther to be observed, that the case was confessedly new in its character and circumstances. The researches of counsel throughout | p. 54 the progress of this protracted controversy, have not discovered any cases which, in point of law, can govern this. If it is new here, it may well be deemed to have been new and embarrassing to Lieutenant Stockton. In such a case, it is not matter of surprise, that he should come to the conclusion that it was not proper to take upon himself the responsibility of a final decision; but to confide the honour of the nation, as well as the rights of the other party, to judicial decision. No inference is attempted to be drawn, that his acts were intentionally oppressive and harsh; and it would be going a great way to declare, that an exercise of honest discretion, in a case of wrong on the other side, ought to draw after it the penalty of damages.

There is another more general consideration, which is entitled to great weight in this case. In cases of capture, strictly so called, no decision has been cited, in which, if the capture itself was justifiable, the subsequent detention for adjudication has ever been punished by damages. As far as counsel have examined, or our own researches extend, no such principle has ever been established. The present case stands upon a strong analogy, and to inflict damages would be to desert that analogy. Even in cases of marine torts, independent of prize, Courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law. They have exercised a con- p. 55 scientious discretion | upon the subject. A party, who is *in delicto*, ought to make a strong case, to entitle himself to general relief.

The case of *Le Louis*, (2 *Dodson's Rep.* 210.) is a striking example in

illustration of these remarks. There, a French slave ship was, in a time of peace, taken possession of by an English armed cutter, after a sharp engagement, in which several men were killed on both sides. The ship was carried into Sierra Leone for adjudication, and, subsequently, the cause came before the High Court of Admiralty upon appeal. The decision pronounced by Lord Stowell appears to have been made after very full consideration, and is expounded in his most elaborate manner. He decided, that the original seizure was totally unjustifiable ; and that, even if the slave trade was prohibited by the French laws, (which, he thought, it was not,) still, it was not for English cruizers to claim a right of search, or to seize such vessels to enforce those laws. He, therefore pronounced a decree of restitution. But he denied damages and costs to the claimant. His language on that occasion was, ' Upon the matter of costs and damages, that have been prayed, I must observe, that it is the first case of the kind, and that the question itself is *primæ impressionis;* and that, upon both grounds, it is not the inclination of the Court to inflict such a censure.' Here, then, we have a case of an acknowledged maritime trespass, accompanied with circumstances of immediate and fatal injury, in which the original wrong travelled along with, | and infected p. 56
the whole subsequent proceedings ; and yet the Court, on account of its being the first instance, and of the novelty of the question, deemed it a conscientious exercise of its discretion not to award damages. The case before this Court is also of the first occurrence, and the question is entirely new in its presentation. It has this striking fact, in which it is most favourably distinguished from the *Louis*, that the original seizure was justifiable, and if the intent of piratical aggression had been established, condemnation must have ensued.

If, then, this Court should, under these circumstances, award damages, it would take a new step, never known to have been taken before by a Court of admiralty. It would desert the analogy of cases of justifiable capture in matters of prize, and introduce a rule harsh and severe in a case of first impression, whose bearing and character have engaged the bar and bench in several most laborious discussions, and inflict upon an honest exercise of discretion, a punishment which has been denied, in the *Louis*, to an inexcusable wrong.

There are one or two other suggestions which were urged in the argument, that ought not to be passed over in silence. It is said, that the tort, if it ought to be redressed at all by a proceeding *in rem*, was exclusively cognizable in the Courts of Portugal. We are not aware of any principle upon which this position can be legally maintained. There is no more reason why the Courts of Portugal should hold exclusive | jurisdiction upon this case, than the Courts of this country. We see no p. 57
difficulty in supporting the jurisdiction as concurrent in both nations.

But, if there be any choice, it seems more properly to belong to the country of the injured, than of the offending, party.

It is also said, that, at all events, the cargo was not liable to condemnation, even if the offending vessel was liable under the act of Congress. Probably this is true in respect to that act. But the second count embraces a wider range; and if it had been proved in its aggravated extent, it does not necessarily follow, that the cargo ought to be exempted. That is a question which would require grave deliberation. It is, in general, true, that the act of the master of the vessel does not bind the innocent owner of the cargo; but the rule is not of universal application. And where the master is also agent of the owner of the cargo, or both ship and cargo belong to the same person, a distinction may, perhaps, arise, in the principle of decision. But, however this may be, in the present case, if the vessel was sent in for adjudication, the cargo must, of necessity, accompany her; nor could its particular ownership be fully ascertained, until the examinations of the crew were regularly taken. There is no evidence in this case to show, that at any subsequent period it was desirable, or could have been advantageous to the claimants, to
p. 58 have separated the ship and | cargo, and to have instituted a new voyage for the latter under other auspices.

In the District Court, an allowance was made of five hundred dollars, distributable among the crew, on account of their confinement on the passage to Boston, upon the ground, that the sending in of the vessel was wrongful. That award was reversed in the Circuit Court; and no appeal was taken by the crew, as, indeed, none could be, on account of the insufficiency of the sum to entitle the parties in interest to appeal. It is only necessary, therefore, to state, that that matter is not now before this Court; and, it is to be presumed, that the confinement was such only as was indispensable for the safety of the seizors.

Upon the whole, it is the opinion of the Court, that the decree of the Circuit Court ought to be affirmed, and it is, accordingly, affirmed, without costs to either party.

Decree accordingly.

The Palmyra.—Escurra, master.

(12 Wheaton, 1) 1827.

A question of probable cause of seizure, under the Piracy Acts of the 3d March, 1819, ch. 75. and the 15th of May, 1820, ch. 112.

In such a case, although the crew may be protected by a commission *bona fide* received, and acted under, from the consequences attaching to the offence of piracy, by the general law of nations, although such commission was irregularly issued; yet, if the defects in the commission be such as, connected with the insubordination and predatory spirit of the crew, to excite a justly founded

suspicion, it is sufficient, under the act of Congress, to justify the captors for bringing in the vessel for adjudication, and to exempt them from costs and damages.

Although probable cause of seizure will not exempt from costs and damages, in seizures under mere municipal statutes, unless expressly made a ground of justification by the law itself, this principle does not extend to captures *jure belli*, nor to marine torts generally, nor to acts of Congress authorizing the exercise of belligerent rights to a limited extent, such as the Piracy Acts of the 3d of March, 1819, c. 75. and the 15th of May, 1820, c. 112. ‖

APPEAL from the Circuit Court of South Carolina. p. 2

This was a libel of information under the act of Congress of the 3d of March, 1819, c. 75. entitled, 'An act to protect the commerce of the United States, and punish the crime of piracy,' continued in force by the act of the 15th of May, 1820, c. 112. The libel was filed by the District Attorney, as well in behalf of the United States, as of the captors; and alleged that the brig Palmyra, *alias* the Panchita, was a vessel, from which a piratical aggression, search, depredation, restraint, and seizure, had been attempted and made, upon the high seas, in and upon the schooner Coquette, a vessel of the United States, and of the citizens thereof, and in and upon the master, officers, and crew of the said schooner Coquette, citizens of the United States; and in and upon the Jeune Eugenie, a vessel of the United States, and of the citizens thereof, and in and upon Edward L. Coffin, the master, and the officers and crew of the said vessel, being citizens of the United States; and also in and upon other vessels of the United States, their officers and crews, citizens of the United States; and in and upon other vessels of various nations, states, and kingdoms, their officers and crews, citizens and subjects of the said states and kingdoms. The vessel in question was an armed vessel, ostensibly cruising as a privateer, under a commission from the King of Spain, and was captured on the high seas, on the 15th of August, 1822, by the United States' vessel of war the Grampus, commanded by Lieutenant Gregory, after a short resistance, and receiving a fire from the Grampus, by which one man was killed, and six men were wounded. The captured vessel was sent into the port of Charleston, South Carolina, for adjudication. A libel was filed, and a claim interposed; and upon the proceedings in the District Court, a decree was pronounced, restoring the brig to the claimants, without damages for the capture, injury, or detention. From this sentence, an appeal was interposed by both parties to the Circuit Court; and upon the hearing in that Court, a decree was pronounced affirming so much of the decree as acquitted the brig, and reversing so much of | it as denied damages; and the Circuit Court p. 3
proceeded finally to award damages, to the amount of 10,288 dollars and 58 cents. From this decree an appeal was interposed in behalf of the United States and the captors, to the Supreme Court. The cause

coming on to be heard in this Court, at February term, 1825, it not appearing that there had been any final decree in the Circuit Court, ascertaining the amount of damages, the cause was dismissed.[1] But at the last term, it being discovered that in point of fact there had been a final award of damages, which was omitted by mistake in the transcript of the record certified by the Clerk of the Court below, this Court, on motion of the appellants, ordered the cause to be reinstated.

At the hearing in the Court below, it appeared that the commission of the Palmyra was numbered 38, and entitled in the margin, '*Real Passaporte de Corso para los Mares de Indias;*' that is, '*A royal cruising passport for the Indian seas.*' The great seal of Spain was affixed to it, and it was signed with the royal sign manual with the usual formula: '*Yo el Rey.*' It was afterwards countersigned by the Secretary of State and Marine Affairs, and dated at Madrid, the 10th of February, 1816. The blanks in the passport or commission, were filled up to Don Pablo Llanger, an inhabitant of Cadiz, to arm for war his Spanish *schooner* (*Goleta*) called the Palmyra, *of ninety-three tons*, one twelve pound cannon, and eight carronades, ten pounders, with a crew of one hundred men. A printed note on the back of the commission, signed by Juan Dios Robiou, lieutenant in the national navy, and captain of the port of Porto Rico, dated on the 5th of February, 1822, renewed the commission in favour of *Llanger, as captain* of the Palmyra, for a new cruise of three months, it having been originally granted for the term of three months, which had expired. The vessel, on board of which the commission was found, was in fact a *brig of one hundred and sixty tons, commanded*
p. 4 *by Captain Escura.* Various testimony was taken as to the | acts of piracy committed by the Palmyra upon the Coquette and the Jeune Eugenie, as to the insubordination and predatory spirit of the crew of the Palmyra, and as to the nature and circumstances attending the encounter between the Palmyra and the Grampus, which gave rise to a question of fact in respect to the justifiableness of the cause of capture. But it has not been thought necessary to analyse the testimony, as the most material facts are stated in the opinion of the Court.

January 9th.

The *Attorney General*, and Mr. *Hayne*, for the appellants, argued, that the Palmyra was not lawfully and regularly commissioned; and that, admitting the vessel was so commissioned, she had forfeited her character by the misconduct of the officers and crew, and acquired that of a pirate.

1. A commission to cruise is a delegated authority, and can only proceed from the sovereign.[2] Subordinate agents may be employed to

[1] S. C. 10 *Wheat. Rep.* 502.
[2] *Martens, Privateers*, 11–38. 2 *Azuni*, 353. *Mr. Johnson's translation.*

execute the will of the sovereign in that respect, but the actual delegation of the power must clearly appear. The original commission being issued by the King of Spain to Captain Llanger, for a cruise of three months, which had expired, the commission was *functus officio*. Its subsequent extension to Captain Escura, by the Port Captain of Porto Rico, was without any authority from the King for that purpose.

2. A commission to cruise is given, not to the armed *vessel*, but to the *officer* commanding the vessel; and though the officer next in rank may, in his absence, succeed to his rights, he does so by becoming captain for the time being. It has, therefore, been expressly determined, that if in the absence of the master, a privateer makes a capture, it is not such a capture as vests a prize interest in the captors, but it must be condemned as a droit.[1]

3. It has become an established rule, and made necessary | by the p. 5
laws of all nations, that every privateer, before she is permitted to cruise, shall give *security*, and this fact must appear on the face of the commission itself.[2] Such security is required by the laws of Spain, but was not given in this case.

4. The learned counsel entered into a minute examination of the facts, to show that the vessel ought to have been condemned as a piratical vessel, under the law of nations, or as having committed a piratical aggression under the acts of Congress, which were in conformity with the law of nations. They then proceeded to argue, that however this might be, there was, at all events, probable cause for the capture of the Palmyra, and for sending her in for adjudication. Probable cause had been defined to be less than evidence which would justify condemnation. In its legal sense, it means a seizure made under circumstances which warrant suspicion.[3] The term must receive the same exposition in matters of prize, and is applied to a captor as well as a seizor.[4] In all captures made *jure belli*, circumstances of strong suspicion will justify the captors, and the same circumstances must equally justify a seizure made under this act of Congress, which authorizes hostilities against those, who, by their conduct, have acquired the piratical character, and forfeited the protection of their own country. Indeed, this must now be considered as a settled principle in this Court, since the decision of the case of the *Marianna Flora*;[5] every circumstance of which would find its parallel in the present case. The Court having determined that it will not look beyond the act of Congress for a description of piratical vessels, and that no damages will be given for bringing in for adjudication,

[1] 3 *Rob.* 195. 224. 5 *Rob.* 280.
[2] *Wheat. Capt.* 41. 320. *Martens*, 4. 6. *Bynk. Q. J. Pub. Duponceau's transl.* 147. 2 *Bro. Civ. and Adm. Law*, 339. *Molloy*, 49.
[3] Locke v. The United States, 7 *Cranch*, 339. 348.
[4] 1 *Mason's Rep.* 27. 3 *Cranch*, 458. 491.
[5] 11 *Wheat. Rep.* 1.

after capture of a vessel falling within that description, if the seizing
p. 6 officer | acted *bona fide* in the honest discharge of his duty under the law, and the instructions of the President, although the Court itself might be of opinion that he ought to have released the vessel, nothing remains but to apply these principles to the facts of the present case. The same doctrine had also been laid down by Sir W. Scott, in a case which this Court cite with approbation in the judgment in the *Marianna Flora*.[1]

The learned counsel further insisted, that the seizing officer was fully justified in capturing, and sending in for adjudication, the Palmyra, upon the following, among other grounds. 1. Because the vessel had, in the very words of the statute, committed various acts 'of piratical aggression, search, restraint, depredation, and seizure,' on American, and other vessels. 2. Because the conduct of the vessel, in searching American ships, in violation of the treaty between the United States and Spain, and all the other circumstances of the case, warranted the worst suspicions respecting her character and conduct. 3. Because the conduct of the commander of the Palmyra, after the capture, and the unsatisfactory explanations given by him of the above circumstances, confirmed those suspicions; and the seizing officer not being, according to his instructions, 'satisfied that she was acting under a regular commission, and not piratically,' he was bound to send her in for adjudication.

Mr. *Tazewell*, for the respondents, argued, (1.) That the Court had no authority to reinstate the cause, after it was dismissed at a former term: 1. Because it might operate to the prejudice of the sureties, to whom the property had been delivered, on bail, in the Court below; and, 2. Because the cause might be heard in this Court upon the appeal, in respect to the sentence of restitution, that being the only decree in which the United States had any interest as a party; and that, as to damages, the captors were the only persons responsible for damages,
p. 7 and they alone had a right | of appeal respecting that subject; so that the original cause had thus become divided into two causes, in which each party was an actor.

2. The learned counsel also insisted that the libel was defective, in not charging with sufficient precision the particular acts of piratical aggression, and in omitting to allege a previous prosecution and conviction of the captured persons of the crime of piracy, which, it was insisted, was an essential prerequisite to the proceeding *in rem*.

3. As to the general merits, he argued with great minuteness and ability upon the facts, to show that the vessel had not been guilty of a piratical aggression, within the meaning of the acts of Congress, and that no such probable cause existed as justified the captors in the original seizure, and in bringing in the vessel for adjudication. The evidence

[1] The Louis, 2 *Dodson's Adm. Rep.* 210.

was not sufficient to establish any acts of sea robbery, constituting a piratical character, or general habit of piracy; and so far from having committed a piratical aggression on the Grampus, the Palmyra had merely acted in self defence, the avowed purpose of Lieutenant Gregory being to capture her upon suspicion. The case presented, was that of a hostile attack made by a vessel of war of the United States on a foreign vessel, known to be regularly commissioned, and sent in for adjudication after her character was satisfactorily explained. But even supposing there was probable cause for the seizure and detention, that would not excuse, unless it was followed by an actual condemnation. Probable cause will not excuse from remunerative damages, in any case, unless of a capture *jure belli*, or where it is expressly provided as a justification by some municipal law. This doctrine was clearly recognised by the Court in the case of the *Apollon*.[1]

January 15th.

Mr. Justice STORY delivered the opinion of the Court.

This is the case of a proceeding *in rem*, by a libel of information founded on the act of Congress of the third of | March, 1819, ch. 75. as p. 8
continued in force by the act of Congress of the 15th of May, 1820, ch. 112. The second section of the former act authorizes the president 'to instruct the commanders of public armed vessels of the United States, to seize, subdue, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel.' The fourth section declares, 'that whenever any vessel or boat *from which* any piratical aggression, search, restraint, depredation, or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, *after due process and trial*, in any Court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought, and the same Court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.'

The brig Palmyra is an armed vessel, asserting herself to be a privateer, and acting under a commission of the King of Spain, issued by his authorized officer at the Island of Porto Rico. She was captured on the high seas on the 15th of August, A. D. 1822, by the United States vessel of war Grampus, commanded by Lieutenant Gregory, after a short resistance, and receiving a fire from the Grampus, by which one man

[1] 9 *Wheat. Rep.* 362.

was killed, and six men were wounded. She was sent into Charleston, South Carolina, for adjudication. A libel was duly filed, and a claim interposed; and upon the proceedings in the District Court of that district, a decree was pronounced by the Court, that the brig be acquitted, without any damages for the capture, injury, or detention. From this decree an appeal was made, by both parties, to the Circuit Court; and upon the hearing in that Court, where, for the first time, the officers of the privateer were examined as witnesses, the Circuit Court pronounced
p. 9 a decree, affirming | so much of the decree of the District Court, as acquitted the brig, and reversing so much of it as denied damages, and proceeded finally to award damages to the claimants, to the amount of 10,288 dollars and 58 cents. From this decree there was an appeal, interposed on behalf the United States and the captors, to the Supreme Court. The cause came on to be heard upon this appeal, at February term, 1825, and upon inspection of the record, it did not then appear that there had been any final decree, ascertaining the amount of damages. The Court were of opinion, that if there had been no such decree, the case was not properly before the Court upon the appeal, there not being any *final* decree, within the meaning of the act of Congress. The Court considered, that the damages were but an incident to the principal decree; that the cause was but a single one; and that the cause could not, at the same time, be in the Circuit Court for the purpose of assessing damages, and in this Court upon appeal, for the purpose of an acquittal or condemnation of the vessel. The questions indeed were different; but the cause was the same. Upon this ground, the appeal was dismissed. But at the last term of the Court, it appearing that in point of fact there had been a final award of damages, and that the error was a mere misprision of the clerk of the Circuit Court in transmitting an imperfect record, the Court, upon motion of the appellants, at the last term, ordered the cause to be reinstated.

It is now contended, that this Court had no authority to reinstate the cause after such a dismissal; 1. Because it may operate to the prejudice of the stipulators or sureties, to whom the privateer was delivered, upon stipulation, in the Court below; and, 2. Because the cause was capable of being heard in this Court upon the appeal in respect to the decree of acquittal, that being the only decree in which the United States had any interest as a party; and that as to the damages, the captors were the only persons responsible for damages, and they alone had a right of appeal respecting the same; so that by operation of law,
p. 10 the cause had become | divided into two separate and distinct causes, in which each party was an actor.

This Court cannot concur in either objection. Whenever a stipulation is taken in an admiralty suit, for the property subjected to legal process

and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the Court, which it could properly exercise, if the thing itself were still in its custody. This is the known course of the Admiralty. It is quite a different question, whether the Court will, in particular cases, exercise its authority, where sureties on the stipulation may be affected injuriously. That is a subject addressed to its sound discretion. In the present case, there was no ground for surprise or injury to the stipulators, or indeed to any party in interest. If there had been no final award of damages, the cause would not have been properly before this Court, and the appeal itself, being a nullity, would have left the cause still in the Circuit Court. But as such an award was made, the appeal was rightfully made; and the dismissal, being solely for a defect of jurisdiction apparent on the record, and founded on a mistake, constituted no bar to a new appeal, even if a general dismissal might. The appeal then might, at any time within five years, have been lawfully made, and have bound the parties to the stipulation, to all its consequences. The difference between a new appeal, and a reinstatement of the old appeal, after a dismissal from a misprision of the clerk, is not admitted by this Court justly to involve any difference of right as to the stipulators. Every Court must be presumed to exercise those powers belonging to it, which are necessary for the promotion of public justice; and we do not doubt that this Court possesses the power to reinstate any cause dismissed by mistake. The reinstatement of the cause was founded, in the opinion of this Court, upon the plain principles of justice, and is according to the known practice of other judicial tribunals in like cases.

The other objection has not, in our opinion, a more solid | foundation. p. 11
The libel was filed by the District Attorney, as well in behalf of the United States, as of the captors, and prayed, as usual, a condemnation of the vessel, and distribution of the proceeds. This fact is noticed for the purpose of answering the observation made at the bar, as to the parties to the libel. It has been supposed, that the United States, and the captors, are to be deemed severally libellants, having distinct rights, both of prosecution and appeal. But this proceeds upon a mistake. In every case of a proceeding for condemnation, upon captures made by the public ships of war of the United States, whether the same be cases of prize, strictly *jure belli*, or upon public acts in the nature of captures *jure belli*, the proceedings are in the name and authority of the United States, who prosecute for themselves as well as for the captors. The captors cannot, without the authority of the government, proceed to enforce condemnation. The suit is, in form and substance, a proceeding by and in the name of the United States, for the benefit of all concerned. And whether the question respect the point of condemnation, or of

damages, the United States have a right of appeal coextensive with the whole matter in litigation, and may interpose their protection to guard their agents and officers against injury and damages. These agents and officers are, indeed, in a certain sense, parties to the suit, as the seizing officer is in cases of mere municipal seizures; and when the claimant makes himself, by a demand of damages, an actor in the suit, no doubt exists that the Court may proceed to decree damages against them, and thus entitle them to a separate right of appeal, if the government should feel that it had no further interest to pursue the suit. But still the right to damages must always be dependent upon the question of condemnation or acquittal, for it can never be successfully contended, that if a condemnation is finally adjudged, a decree for damages can be maintained. And, on the other hand, in a case of acquittal, the whole circumstances of the case must be taken into consideration, in order to ascertain that
p. 12 the case is one which justifies an award of damages. | In the present case, there was an appeal entered by the District Attorney for the United States, and also for the captors, from the decree of the Circuit Court. If this decree was final, such an appeal brought up the whole cause as to all the parties; and would, in point of law, have produced the same effect, if in form the appeal had only been in the name of the United States. If the decree was not final, (as upon the original record it appeared to this Court not to be,) then it was void as to all parties. Either way, then, there never was any separation of the parties libellants, so as to give rise to the point of separate independent causes. We are, then, of opinion, that the whole cause is now rightfully before us.

It is contended on behalf of the appellees, that the present suit cannot be maintained, because the libel itself is fatally defective in its averments. It is said to be too loose, inartificial and general in its structure, to give a just foundation for any judgment of condemnation. If this were admitted to be true, the only effect would be, supposing the merits on the evidence appeared to be in favour of the libellants, that the Court would, according to its known course of practice, remand the cause to the Circuit Court, with directions to allow an amendment of the libel, and ulterior proceedings consequent thereon. But there is asserted to be another fatal defect in the averments of the libel, which is incapable of being cured, because it cannot be established in point of fact; and that is, that the offenders are not alleged to have been convicted upon any prosecution *in personam*, of the offence charged in the libel. The argument is, that there must be a due conviction upon a prosecution and indictment for the offence *in personam*, averred and proved, in order to maintain the libel *in rem*.

In respect to the first objection, it must be admitted, that the libel is drawn in an inartificial, inaccurate, and loose manner. The strict

rules of the common law as to criminal prosecutions, have never been supposed by this Court to be required in informations of seizure in the Admiralty for forfeitures, which are deemed to be civil proceedings *in* | *rem*. Even on indictments at the common law, it is often sufficient to p. 13
state the offence in the very terms of the prohibitory statute; and the cases cited by the Attorney General are directly in point. In informations in the Exchequer for seizures, general allegations bringing the case within the words of the statute, have been often held sufficient. And in this Court it has been repeatedly held, that in libels *in rem*, less certainty than what belongs to proceedings at the common law, will sustain a decree of condemnation, if the words of the statute are pursued, and the allegations point out the facts, so as to give reasonable notice to the party to enable him to shape his defence. There is, indeed, in Admiralty proceedings, little ground to insist upon much strictness of averment, because, in however general terms the offence may be articulated, it is always in the power of the Court to prevent surprise, by compelling more particular charges as to the matters intended to be brought forward by the proofs. In general, it may be said, that it is sufficient in libels *in rem*, for forfeitures, to allege the offence in the terms of the statute creating the forfeitures. There may be exceptions to this rule, where the terms of the statute are so general as naturally to call for more distinct specifications. Without pretending to enumerate such exceptions, let us look at the allegations in the amended libel in the present case. It charges, 'that the said brig, called the Palmyra, &c. was, and is, a vessel from which a piratical aggression, search, depredation, restraint, and seizure, has been first attempted and made, to wit, upon the high seas, in and upon the schooner Coquette, a vessel of the United States, and of the citizens thereof, and in and upon the master, officers, and crew of the said schooner Coquette, citizens of the United States;' and also in and upon the Jeune Eugenie, a vessel of the United States, and of the citizens thereof, and in and upon Edward L. Coffin, the master, and the officers and crew of the said vessel, being citizens of the United States, and *also in and upon other vessels of the United States, their officers and crews, citizens of the United States, and in and upon other vessels of various nations, states and* | *kingdoms, their officers and crews, citizens and* p. 14
subjects of said states and kingdoms.' Now, whatever may be said as to the looseness and generality, and consequent insufficiency of the latter clauses of this allegation, the former specifying the Coquette and Jeune Eugenie, (upon which alone the proofs mainly rely for condemnation,) have, in our opinion, reasonable and sufficient certainty. It was not necessary to state in detail the particular acts constituting the piratical aggression, search, depredation, restraint, or seizure. The general words of the statute are sufficiently descriptive of the nature of

the offence; and the particular acts are matters proper in the proofs. We may, then, dismiss this part of the objection.

The other point of objection is of a far more important and difficult nature. It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not devested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist, where there is both a forfeiture *in rem* and a personal penalty. |
p. 15 But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*. This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America, the jurisdiction over proceedings *in rem*, is usually vested in different Courts from those exercising criminal jurisdiction. If the argument at the bar were well founded, there could never be a judgment of condemnation pronounced against any vessel coming within the prohibitions of the acts on which the present libel is founded; for there is no act of Congress which provides for the personal punishment of offenders, who commit 'any piratical aggression, search, restraint, depredation or seizure,' within the meaning of those acts. Such a construction of the enactments, which goes wholly to defeat their operation, and violates their plain import, is utterly inadmissible. In the judgment of this Court, no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature.

Having disposed of these questions, which are preliminary in their nature, we may now advance to the consideration of those which turn

upon the merits of the cause. These questions are, 1. Whether the present be, upon the facts, a case for condemnation; and, if not, 2. Whether it be a case for remunerative damages, for vindictive damages are, and must be disclaimed.

Upon the first point, it is unnecessary to go into any examination at large of the various facts preceding and accompanying the capture, because the Judges are divided in opinion; and consequently, according to the known practice of the Court, the decree of the Circuit Court, so far as it pronounced a decree of acquittal, must be affirmed.

In respect to the second point, we are all of opinion that the case is clearly not a case for damages. The whole circumstances present such well founded grounds for suspicion | of the piratical character and conduct p. 16
of the privateer, as required Lieutenant Gregory, in the just exercise of his instructions from the President, under the acts of Congress, to subdue and send her in for adjudication. That her crew were guilty of plunder from the Coquette and the Jeune Eugenie, is established by proofs entirely competent and satisfactory. Her exercise of the right of search on these vessels was irregular and unjustifiable, and indicated on the part of the boarding officers no disinclination to petty thefts, if they avoided forcible robbery. Her commission is itself liable to much suspicion and criticism. It varies essentially in the description of the rig, the size, and the denomination of the vessel from that on board of which it is found. It purports to be for a schooner of 93 tons, under the command of Don Pablo Llanger; it is found on board of a brig of 160 tons, commanded by Captain Escurra. It was originally granted for a three months' cruise, which had expired; and it purports to be renewed by the Port Captain of Porto Rico, a subordinate agent of the King of Spain, for a new cruise, by an endorsement on it, without any known authority. We do not advert to these circumstances to establish the position that the commission was utterly void, or rendered the exercise of belligerent rights piratical. Whatever may be the irregularities in the granting of such commissions, or the validity of them, so far as respects the King of Spain, to found an interest of prize in the captors, if the Palmyra *bona fide* received it, and her crew acted *bona fide* under it, it ought, at all events, in the Courts of neutral nations, to be held a complete protection against the imputation of general piracy. But the defects of the commission, connected with the almost total want of order and command on board of the privateer, and the manifest insubordination, and predatory spirit of the crew, could not but inflame to a high degree every other just suspicion. In short, taking the circumstances together, the Court think that they presented, *prima facie*, a case of piratical aggression, search, restraint, and depredation, within the acts of Congress, open to explanation indeed, but if unexplained, |

p. 17 pressing heavily on the vessel for the purpose of forfeiture. Lieutenant Gregory, then, was justifiable in sending her in for adjudication, and has been guilty of no wrong calling for compensation.

It has been argued at the bar, that probable cause of seizure in this case constitutes no ground of defence against the claim of damages. It has been truly stated as the settled doctrine of this Court, that in cases of seizures under mere municipal laws, probable cause, unless so made by statute, constitutes no ground for denying damages, or justifying the seizure. But it is supposed, that probable cause is not an excuse or justification of any seizure or capture, except in cases *jure belli;* and the case of *The Apollon*, in this Court, (9 *Wheat. Rep.* 362.) is relied on to establish this position. That case contains no doctrine leading justly to any such conclusion. It was a case of seizure under our revenue laws, and, in the opinion of the Court, the point is examined how far probable cause constituted, in that case, a ground to exempt from damages. On that occasion the Court said, that the argument had not distinguished between probable cause as applied to cases of capture *jure belli*, and as applied to cases of municipal seizures; and then proceeded to state the distinction. There was no intimation, that in cases of marine torts generally, or under laws authorizing the exercise to a limited extent of belligerent rights, or *quasi* belligerent rights, probable cause might not be a sufficient excuse. In the case of the *Marianna Flora*, at the last term, (11 *Wheat. Rep.* 1.) the very point was before the Court, and it was in that case held, that probable cause was a sufficient excuse for a capture under circumstances of hostile aggression at sea. Indeed, in cases of marine torts arising under the general maritime law, probable cause often is a complete excuse for the act, and always goes in mitigation of damages. In the Admiralty, the award of damages always rests in the sound discretion of the Court, under all the circumstances. The case of the *Le Louis*, in 2 *Dods. Rep.* 210. is a strong illustration of the doctrine. But, in cases like the present, where the public armed ships |
p. 18 of the United States are authorized to make captures to a limited extent, the authority so exercised by them must be deemed to stand upon the same analogy as captures strictly *jure belli*. And the doctrine of the prize courts as to the denial of damages, where there is probable cause for the capture, furnishes the proper rule to govern the discretion of the Court. We are then of opinion, that in the present case there was strong probable cause for the capture, and that the decree of the Circuit Court, so far as it awards damages to the claimants, ought to be reversed.

It remains only to remark upon one or two points made against the competency of some of the testimony in the cause. It is objected, that Lieutenant Gregory is not a competent witness, because he is, notwithstanding his release of his interest as captor, interested to defeat

the claim for damages. However well founded this objection may be as to his competency on the point of damages, having been admitted both in the District and Circuit Courts, as a witness, without objection, we think there was a waiver of the objection, and it cannot now be insisted on. As to the depositions of Captains Souther and Coffin, they were taken under commissions duly issued from the Circuit Court according to the rule of this Court, and are, therefore, admissible upon the strictest principles.

DECREE. This cause came on, &c. On consideration whereof, it is ADJUDGED, ORDERED, and DECREED, that so much of the decree of the Circuit Court as decrees restitution of the brig Palmyra to the claimants, be, and the same is, hereby affirmed: and that so much of the decree of the said Circuit Court as awards damages to the claimants, be, and the same is, hereby REVERSED and ANNULLED; and it is further ORDERED, that said cause be remanded to said Circuit Court for further proceedings according to law.

Edward Carrington and others v. The Merchants' Insurance Company.

(8 Peters, 495) 1834.

Insurance. In a policy of insurance there was a memorandum stipulating, that 'the assurers shall not be liable for any charge, damage or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war.' This provision is not to be construed, that there must be a legal or justifiable cause of *condemnation*, but that there must be such a cause for *seizure* or *detention*.

It is not every seizure or detention which is excepted, but such only as is made for and on account of a particular trade. A seizure or detention, which is a mere act of lawless violation, wholly unconnected with any supposed illicit or contraband trade, is not within the terms or spirit of the exception. And as little is a seizure or detention, not bona fide made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or colour for an act of lawless violence: for, under such circumstances, it can in no just sense be said to be made for or on account of such trade. It is a mere fraud to cover a wanton trespass; a pretence, and not a cause for the tort. To bring a case then within the exception, the seizure or detention must be bona fide, and upon a reasonable ground. If there has not been an actual illicit or contraband trade, there must at least be a well founded suspicion of it—a probable cause to impute guilt, and justify further proceedings and inquiries; and this is what the law deems a legal and justifiable cause for the seizure or detention.

The ship insured, when seized, had not unloaded all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners; she sailed on that voyage from Providence, R. I., with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; the contraband articles had been landed, before the policy, which was

a policy on time designating no particular voyage, had attached; the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and the alleged cause of the seizure and detention was the trade in articles contraband of war, by the landing of the powder and muskets, which formed a part of the outward cargo. By the principles of the law of nations there existed, under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods: there was a legal and justifiable cause of seizure.

According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured in delicto, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty.

p. 496 The penalty is applied to the latter only, when there has | been some actual co-operation on their part, in a meditated fraud upon the belligerents, by covering up the voyage under false papers and with a false destination. This is the general doctrine when the capture is made in transitu, while the contraband goods are yet on board. But when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband. And the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established that it exists only in favour of neutrals who conduct themselves with fairness and good faith in the arrangement of the voyage. If, with a view to practise a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers and with a false destination, the mere deposit of the contraband in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral.

Nothing is better settled both in England and America, than the doctrine that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a droit of the government.

When there has been a bona fide seizure and detention for and on account of illicit or contraband trade, and by a clause in the policy of insurance it was agreed that 'the assurers should not be liable for any charge, damage or loss, which may arise in consequence of seizure or detention for or on account of illicit trade or trade in articles contraband of war,' a sentence of condemnation or acquittal, or other regular proceeding to adjudication, is not necessary to discharge the underwriters. If the seizure or detention be lawfully made for or on account of illicit or contraband trade, all charges, damages and losses consequent thereon, are within the scope of the exception. They are properly attributable to such seizure and detention as the primary cause, and relate back thereto. If the underwriters be discharged from the primary hostile act, they are discharged from the consequences of it.

On a certificate of division of opinion of the judges of the circuit court of the United States for the district of Massachusetts.

The case, as stated in the opinion of the court, was as follows.

On the 1st of October 1824, the defendants, the Merchants' Insurance Company, underwrote a policy of insurance for the plaintiffs, Carrington and others, for ten thousand dollars, on property on board the ship General Carrington, at and from the port of Coquimbo in Chili, to any port or ports, place or places, one or more times, for and during the term of twelve calendar months, commencing on the 5th day of June 1824 | at noon, and ending on the 5th day of June 1825 at noon. The p. 497
policy is against the usual perils, and contains the following clause. 'It is also agreed that the assurers shall not be answerable for any charge, damage or loss which may arise in consequence of seizure or detention, for or on account of illicit or prohibited trade, or trade in articles contraband of war. But the judgment of a foreign consular or colonial court shall not be conclusive upon the parties as to the fact of there having been articles contraband of war on board; or as to the fact of an attempt to trade in violation of the law of nations.'

The ship sailed from Providence, Rhode Island, on the 21st of December 1823, cleared for the Sandwich Islands and Canton, but was immediately bound to Valparaiso in Chili, with such ulterior destination as was stated in her orders; the clearance being a usual and customary mode of clearance at that time for vessels bound to Chili and Peru. A part of the cargo consisted of eighteen cases of muskets and bayonets, each case containing twenty; and three hundred kegs or quarter kegs of cannon powder, containing about twenty-five pounds each; and these, together with the residue of the cargo, belonged to the owners of the ship. At the commencement of the voyage, and until the final loss of the ship, open hostilities existed between Spain and the new governments or states of Chili and Peru. From the orders, it was apparent that the object of the voyage was to sell the cargo in Chili and Peru. The ship was to proceed direct for Valparaiso, and was to enter that port under the plea of a want of water. Some part of the cargo was expected to be sold at that port; and thence the ship was to proceed along the coast of Chili and Peru for the purposes of trade. There is no allegation that the underwriters were not well acquainted with the nature and objects of the voyage.

The ship arrived at Valparaiso on the 17th of April 1824. At the time of her arrival, and until the loss, as hereinafter stated, the Spanish royal authorities were in possession of a portion of upper Peru, including Quilca and Moliendo, and of the port of Callao in lower Peru. The rest of Peru, and the whole of Chili, were in possession of the Peruvian and Chilian new governments. In the harbour of Valparaiso sixteen casks of the powder were, with the knowledge of the government, | sent on p. 498
board of an English brig then in the harbour; and, as the plaintiffs allege, sold to the master of the brig: and all the muskets except ten,

alleged to be kept for the ship's use, were landed in Valparaiso with the knowledge of the government.

The ship, with the remainder of her cargo on board, sailed from Valparaiso, early in May following; arrived at Coquimbo, in Chili, on the 13th day of the same month. There the remainder of the powder, except nine casks, more or less damaged, alleged to be retained for the ship's use, was landed in the course of the same month, with the knowledge of the government. The ship sailed from Coquimbo for Huasco, in Chili, on or about the 5th day of June following, and arrived at Huasco in the same month; having sold at the previous port, a part of her outward cargo by permission of the government, as the plaintiffs allege, and taken in merchandise belonging to the plaintiffs, and other citizens of the United States, to be delivered at some ports on the coast. The ship arrived at Quilca, with the greater part of her outward cargo still on board, on the 20th of June, and there sold, with the knowledge of the government, as the plaintiffs allege, a considerable portion of her outward cargo; and delivered some of the articles taken in at the previous ports. While lying at anchor in the roadstead of Quilca, and before she had completed the discharge of her outward cargo, she was seized by an armed vessel called the Constante, commanded by one Jose Martinez, sailing under the royal flag, and acting, as the defendants allege, by the royal authority of Spain; but alleged by the plaintiffs to be fitted out and commissioned at Callao, by Jose Ramon Rodil, the highest military commander of the castle of Callao, holding his commission subordinate to La Serna, the viceroy of Peru, under the king of Spain; there being, as the defendants allege, no regular civil government in the place; the castle of Callao being then, and until the final loss of the ship, besieged by sea and land. The ship was carried from Quilca to Callao, where certain proceedings were had against her and her cargo on board, by the orders of general Rodil; and they were never restored, but were totally lost to the plaintiffs. The alleged cause of the seizure and detention, was the trade in articles contraband of war, by the landing of the powder and muskets in Chili, as aforesaid. |

p. 499 Upon the trial of the cause upon the evidence, the following questions occurred, upon which the opinions of the judges were opposed; and, thereupon, it was ordered by the court, on motion of the counsel for the plaintiffs, that the points on which the disagreement happened, should be certified to the supreme court of the United States, for their decision, viz.

1. Whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause.

2. Whether, assuming the other facts to be as stated and alleged,

and taking the authority of the seizing vessel to be such as the plaintiffs allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo.

3. Whether, assuming the other facts to be as stated and alleged, and taking the authority of the seizing vessel to be such as the defendants allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo.

4. Whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command of Callao, and no civil authority existing therein, and cut off by the forces of the enemy by sea and land from all communication with any superior civil or military officer, could lawfully seize and detain neutral property for contraband trade, if just cause existed for a condemnation thereof.

5. Whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property.

6. Whether, supposing the ship to have traded in articles contraband of war in the ports of Chili, and to have been seized afterwards in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular.

The case was argued by Mr. Binney and Mr. Sergeant, for | the p. 500
plaintiffs; and by Mr. Franklin Dexter and Mr. Webster, for the defendants.

Mr. Binney, for the plaintiffs, contended, upon the first point—whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause; that the seizure must be for a legal and justifiable cause, in order to take it out of the policy; an asserted cause is not enough.

This is evident from the words of the policy, from the context and circumstances of the insurance, from the reason and spirit of the agreement of the parties, from the mischief of the old law; and from the consequences of a contrary doctrine.

The words of the policy designate an actual, not a supposed trade in contraband goods. There cannot be a seizure for cause of contraband, unless there has been actually such a trade. There could not be a seizure *for or on account of such a trade*, without there having been such a trading. If the fact of the trade does not exist, it is a mere allegation, suspicion, or pretence of trade, when there is none in reality. Had such been the intention of the parties the words would have conformed to it.

Both the fact and the illegality must concur, or there is no trade in contraband. This is implied in the term *contraband*. In legal understanding gunpowder and muskets are not contraband; they may be innocently transported by a neutral; although under particular circumstances their transportation may be illegal and a breach of neutrality, and they become contraband. There is no trade in contraband, except what the law declares such; nor can there be a seizure for contraband, when the fact and the law do not concur to prove contraband. The plain natural meaning of the words of the policy is, 1. That there must be a seizure. 2. That there must be a trade in contraband in fact. 3. That it must have been so in law, to justify a seizure.

2. The context is conclusive to show, that the fact of a contraband trade, instead of pretence or allegation, was intended by the parties; and this is conformable to the law. The language used is intended to exclude the conclusion of a material fact, resulting from the judgment
p. 501 of a foreign court; and this | shows the materiality of that question of fact. Both parties agreed that the fact was material, and provision is made to guard against the operation of a foreign judgment; and to leave that question open to the parties, if it should become material.

3. The reason and spirit of the whole contract confirm this construction. The intention of the assured was to secure themselves against unlawful violence. In the policy there were many exceptions in which the assured took upon themselves the risk of loss. An exception against *unlawful violence*, is contrary to the whole spirit of the instrument. An exception against *lawful violence* is not so, but is consistent with its general tenor.

4. The mischief of the contract to the underwriters, before the clause was introduced into policies, sustains the construction.

The clause, it is believed, is of Pennsylvania origin, having been introduced into policies of insurance in Philadelphia in 1788. In Boston it was introduced in 1823. Its history is given by chief justice Tilghman, in Smith v. The Delaware Insurance Company, 3 Serg. and Rawle 82. He says, that the assured contended, that unless the foreign revenue laws were known to them, the underwriters were not answerable for a loss by their violation. Perhaps it would have been more accurate to say that they contended, that if the underwriters knew, or were bound to know that the trade insured was prohibited, they were liable for the loss.

This was so held in 1780, in Lever v. Fletcher, 1 Marsh. 617, and it is now the doctrine of insurance as held by various authorities. Phillips 276; 1 Emerigon 684; 2 Valin. 131; Parker v. Jones, 13 Mass. 173; Richardson v. The Marine Insurance Company, 6 Mass. 12, 114; Seaton v. Low, 1 Johns. Cases 1; 2 Johns. Cases 77, 120; Phill. 280.

The mischief was, that the underwriters were liable, in cases in which

they knew or were bound to know that the trade was contraband or illicit, for a lawful seizure. The clause was introduced to guard against this mischief. It could never have been regarded as a mischief, that the underwriters were answerable for a seizure which was unlawful; and, consequently, the clause should not be construed to extend to such a seizure. |

5. The consequences of a different construction are, that they make p. 502
the clause depend, not on the fact of contraband and the law of contraband, but on the allegation, pretext and false suggestion of the wrongdoer.

The policy protects against thieves, enemies, pirates; but does not protect against a pirate or thief who robs with a lie in his mouth. It makes the case of the assured, however innocent, fall before the false suggestions of a rogue.

These views are sustained by express decisions. Smith v. The Delaware Insurance Company, 3 Serg. and R. 82; Faudel v. The Phœnix Insurance Company, 4 Serg. and R. 59; 1 Caines's Cases in Error 29; Johnstone v. Ludlow, 3 Johns. Cases 481; Church v. Hubbart, 2 Cranch 187, 236, 1 Cond. Rep. 385; 1 Marsh. 356; 1 Cond. Rep. 385, 393, 346; 12 Mass. 291; Pickering's Rep. 281.

Upon the second question—whether, assuming the other facts to be as stated and alleged, and taking the authority of the seizing vessel to be such as the plaintiffs allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo—he contended, that on any supposition, there was no justifiable cause of seizure. The only difference as to the facts under which the second and third questions on which the judges were divided in opinion is, that the authority of the seizing vessel, is by the plaintiffs alleged to have been of one kind, and by the defendants, of another kind. The facts sustain the position of the plaintiffs. The facts sustain the following positions:

1. That a seizure for contraband at Callao was illegal and unjustifiable, because there was no contraband on board; it had all been previously landed in Chili. 2. There was nothing in the other facts to make the seizure legal, in consequence of having previously carried contraband. 3. The seizure was not lawful, because no contraband articles were on board at the time of the seizure. This point of course depends on another: that to justify a seizure for contraband, the contraband goods must be seized.

The character of contraband trade, jure belli, is in one respect peculiar. It is a trade which a neutral has a right to carry on; and which a belligerent has a right to intercept and to confiscate. It presents the case of conflicting rights. The neutral | to do, and the belligerent to p. 503
prevent. If the neutral can carry his right into effect or enjoyment,

the belligerent cannot complain. If the belligerent can intercept him, and prevent his carrying it into effect, the neutral cannot complain. The neutral commits no offence by the successful attempt. The belligerent commits none by defeating it. The contraband article is alone the offence in the sight of the belligerent; and the only penalty is the confiscation of the article.

These principles flow from authorities. Bynk. ch. x. Duponceau's translation, p. 74, 76, 80, 81; Grotius, book 3, ch. 1, 520; Vattel, book 3, ch. 7, sec. 111, 310 (503), sec. 113; Richardson v. The Marine Insurance Company, 6 Mass. 112, 113; The Santissima Trinidad, 7 Wheat. 292, 5 Cond. Rep. 284; 1 Kent's Com. 132; Phillips 152; Seaton v. Low, 1 Johns. Cases 1; 2 Johns. Cases 77, 120.

The doctrine of the English adjudication is, that the contraband articles must be taken, the goods must be intercepted. It is wrong to say this must take place when they are in delicto. There is no delictum. 3 Rob. Adm. Rep. 138 (167).

But it is supposed that some English cases assert the doctrine that if the contraband is carried outward, and the proceeds homeward, they are prize; and if carried out with false papers, or under a false destination, that the penalty may be inflicted on the ship or other goods of the same owner on the homeward voyage.

This doctrine is a novelty, of which it is supposed no trace in any earlier authority than cases decided in 1809, 1810, can be found. These cases are the Baltic, and the Margaret, cited in Chitty's Law of Nations 128, 143. In England, the doctrine is a novelty, merely the result of their principles in regard to the colonial trade, under the rule of 1756; and has not been applied to any other than a case of that trade. It is not the law of nations, as understood by other nations, and shown by their conventional law, particularly by Spain. In support of these positions, cited, The Margaretta Magdalena, 2 Rob. 115; The Rosalie and Betty, 2 Rob. 252; The Nancy, 3 Rob. 102; The Franklin, 3 Rob. 178; 6 Rob. 390.

It is the doctrine of the British, under the rule of 1756, which is,
p. 504 that, whether concealed or not, contraband outward | affected the proceeds home; and if concealed, affected the ship and cargo. It proceeds on the principle, that the whole trade is illegal, except as the British release or permit it. This is shown by the British orders. 4 Rob. appendix A; 7 Rob. 473, appendix, note 1; and the subsequent orders of council, in 2 Rob. 126, 311, appendix, No. 1, 2; 5 Rob. 367, appendix.

This doctrine is an interpolation, as the rule of 1756 was. It has been rejected by the United States. Message of the president of the United States to congress, 27th January 1806, 5 Waites's State Papers 321. It is entirely an English doctrine, and modern English; not admitted

by other nations : and is inapplicable to a voyage to Chili, which is not a relaxed trade, but a trade to an independent country.

The general doctrine claimed for the plaintiffs appears to be sanctioned by the conventional law of nations, between the United States and foreign nations ; that concealment of contraband goods does not aggravate the case. With England, by the treaty of 1794, art. 17, 18—With France, by the treaty of 6th February 1778, art. 12, 13, 23 ; of 3d September 1800, art. 12, 13, 20—With Holland, by the treaty of 8th October 1782, art. 10, 11—With Sweden, by the treaty of 3d April, 1783, art. 7, 12, 13.

The French ordinance of 1681 expressly makes a provision which excludes capture, unless contraband is *on board.* 2. Valin. 266, liv. 3, tit. 9 ; Reglement de 23d July 1704. But the treaty with Spain would seem to leave no doubt on this subject. Treaty of 27th October 1795, confirmed by the treaty of 1819 ; 1 Laws of United States 271 ; 6 Laws of United States 624, art. 15, 17.

Such is the Spanish law generally : contraband is to *be found ;* and is punishable only in delicto. It permits no molestation for having carried contraband articles. 3 Nov. Recop. tit. 8 ; ley 4, 20 June 1801, art. 34, p. 128.

There is no ground on which the seizure was justifiable, within the exception. 1. The contraband was not on board. 2. The papers of the cargo were true. 3. The papers of the ship were true. 4. The clearance was according to the customary form of the place, and in conformity with the requisition of the treaty. Art. 17, 1 Laws U.S. 274, &c. 5. There is | no allegation by the captors of any thing, but the landing p. 505
of contraband in Chili. 6. Chili is an independent state, and was at the time recognized by the United States as such.

The attention of the court is asked to another suggestion. The question is, whether the facts show a justifiable cause of seizure *within the exception :* whether landing contraband at Chili, is a justifiable case of seizure, and is within the exception ?

It may be granted that it was a justifiable cause of seizure ; yet if it is not *within the exception,* then it was not a justifiable cause of seizure to exonerate the underwriters : and the second and third questions must be so answered.

The exception excludes a loss by seizure for *contraband trade* : the question is, contraband trade *on what voyage ?* The answer is, contraband trade on the voyage insured from Coquimbo. The exception means not only *seizure on the voyage insured* for trade or contraband, but *seizure for contraband trade on that voyage.* This is the true interpretation of the clause.

Had not the exception been inserted, the policy would have covered a loss *by contraband trade* on this voyage. The exception is intended to

cut off this loss, and nothing more. The goods are insured for this voyage, and the exception is of contraband in the same voyage.

Whether the underwriters are liable for a seizure made for carrying contraband on a former voyage may, or may not be; but the disagreement certified concerns the *exception;* and the exception does not exclude contraband trade on any voyage but that on which the seizure was made. Upon either hypothesis there was no justifiable cause of seizure, upon the second and third questions.

4. Whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command of Callao, and no civil authority existing therein, and cut off by the forces of the enemy by sea and land from all communication with any superior civil or military officer, could lawfully seize and detain neutral property for contraband trade, if just cause existed for a condemnation thereof.

p. 506 1. A lawful authority to seize, must exist to bring the case | within the exception. 2. A person so described had not lawful authority to make the seizure.

1. The seizure must be by lawful authority. It has been shown, that there must be a justifiable cause of seizure. It follows, that the seizure must be by *lawful authority*, to come within the exception.

A justifiable seizure is a cause which justifies the party who makes the seizure. If he is not authorized to seize, the trade does not justify the seizure, and is not a justifiable cause of seizure. The lawfulness of a seizure, necessarily regards the party who seizes, as much as the offender.

This is not only logically, but it is practically so, under this exception. A seizure by a neutral, by a *pirate*, by the very person with whom the contraband trade is carried on, would all be included, if lawful authority to seize were not necessary. A seizure by any one who has no right to seize, is an act of mere violence and unlawful force. The trade can be no more than a pretence or pretext to such a person. The policy covers all risks on contraband, except the lawful penalties of the trade: the losses lawfully arising from it. But seizure without authority is not one of them; but, in terms, is a loss *unlawfully arising*.

Every seizure without authority is a trespass and wrong, and the policy means to protect the assured against such injuries.

If the laws of Spain did not prevent a seizure by Rodil, or by a vessel under his commission, the same laws made the seizure unlawful. The court must hold, that the contraband did not justify that seizure; was not a justifiable cause of seizure.

The clause does not mean a justifiable cause of seizure in the abstract, but a cause justifying the particular seizure. It means

a seizure according to law, and a trade against the law which justifies him who seizes.

The seizure was not made by lawful authority in this case. This depends on the law of Spain. Proceedings by a competent court, affirming the seizure and condemning the goods, might be evidence of authority to seize; but in this case, there are no such proceedings. The authority of Rodil must be shown by the law of Spain. It is a question to be settled by that law; for unless by that law there was authority to make the seizure, it was unlawful.

There is nothing in the particular circumstances set forth in this p. 507
question, from which the court can infer a lawful authority in Rodil. The circumstances, as stated, do not confer it by force of any principles that are applicable to the case as described. Whether a general so separated can lawfully seize, must depend upon the power that the laws of his own country give him. The case of necessity it supposes, may be sufficient if his sovereign so wills; but not otherwise.

But so far from the acts of Rodil being authorised by the laws of Spain, by those laws this act was piratical. The commission to make prize of war must issue from a different officer, from the commandant militar de la marina; or if there be no such officer, it must be issued by the captain-general of the province.

5. Whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property.

The court in question, like all other courts, must proceed from the sovereign power of the nation. This principle is particularly true as regards prize courts, whose judgments affect the public relations of the country. It is due to other nations, that such court should be authorised by the sovereign power, and by that power only. 2 Azuni 262; 2 Bro. Civil and Ad. Law 331; 1 Wash. C. C. R. 271; 3 Binney 239.

If the constitution of the court is not known, it will be presumed to be legal. If known, and is not according to what is usual among civilized nations, it must be proved to have been enacted by competent authority. The erection of a court is the act of the sovereign; nothing is to be presumed in favour of a court erected by a military commander.

Is such a court as the question supposes, usual among civilized nations? Appointed by a military commander; appointing himself as one of the judges? Possibly the law, the sovereign, may authorise such a tribunal: but it cannot be presumed; because it is unusual, and to the highest degree dangerous to the rights of individuals, and to the peace of the public.

The existence of the power to appoint courts in the hands of a subject, is unknown in the practice of nations; that of a power to appoint the

p. 508 court, himself a judge, is monstrous. The | defendants must show the law for it, or the negative must be adopted. But the laws of Spain are the other way. 3 Recop. 125, art. 11, 12, 13.

6. Whether, supposing the ship to have traded in articles contraband of war in the ports of Chili, and to have been seized afterwards in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged; whether the subsequent proceedings for her adjudication were regular or irregular.

1. There must be a lawful seizure. 2. A lawful cause of seizure. 3. Loss by this cause. The question is, whether lawful adjudication is the only proof. No instance has occurred in which there has been a decision that a loss was within the exception, without such an adjudication. Church v. Hubbart, 2 Cranch 187, 1 Cond. Rep. 390, requires it.

It is the duty of the captors to proceed to a regular adjudication. The question is, whether the seizure legally affects the property, or what is the operation of law upon the thing taken? How is this proved? Force is not a title which the world respects, without the aid of law to sanction it. There being two kinds of force, lawful and lawless force, the usages of the civilized world require, that all claims to property by an act of force, should be shown to be lawful force by the adjudication of a competent tribunal. Wheaton on Cap. 262, 274.

What is a lawful court? It is a court of the nation under whose laws, and by whose authority the seizure has been made, and the thing taken is possessed. This is so in the case of a seizure under municipal law. Hudson v. Guestier, 2 Cond. Rep. 110. If it be a capture as prize of war, this same principle prevails. Wheaton on Cap. 261. Such a court alone has jurisdiction. Adjudications by any other are null and void for want of jurisdiction. The sentence of such a court regularly pronounced, is universally respected; and is conclusive as to its direct effect, and as to the facts directly decided by it. Wheaton on Cap. 274; 4 Cranch Rep. 434, 2 Cond. Rep. 162.

These principles will not be questioned as to the property seized. No court can consider a title as passing but by such an adjudication.
p. 509 Every court must consider the seizure as | an act of mere force, until its legality is adjudged by such a court.

The same is true as to questions of the same kind collaterally arising under a policy of insurance. The court is bound to hold the same doctrine in a collateral inquiry, as if the property were brought before them.

This court has said, that if adjudication is not obtained in reasonable time, the seizure must be regarded as trespass. Hudson v. Guestier, 2 Cond. Rep. 112. If it is to be so regarded in questions of title to property, it must be so as to every question concerning that trespass.

The underwriter who sets up the capture, is bound to prove the very fact that the property was lawfully lost by a seizure for contraband trade. The utmost this court can say is, that it ought to have been so lost: but nothing can show that it was lost according to the law of another country, but the judgment of a competent court.

The difficulty in a case of prize is insuperable. A court of common law cannot adjudge it. It belongs to the prize courts, both the direct and consequential question. Doug. 594, 613; 6 Taunton 439.

This court has regarded the condemnation as necessary to bring the case within the exception. Church v. Hubbart, 2 Cranch 187, 1 Cond. Rep. 390.

Mr. Franklin Dexter, for the defendants.

The answer to the first question must depend on the sense in which the word *cause* is to be understood. If it means, as the counsel for the plaintiff seems to contend, the actual state of the facts, in contemplation of which the seizure was made, the question must be answered in the negative: because to answer it in the affirmative, would be to require that to discharge the underwriters, legal and justifiable cause of condemnation, as well as of seizure and detention, must have existed. Such is not the language of the question, nor of the exception in the policy. It is said, on the other side, that a vessel cannot with propriety be said to be seized for or on account of contraband trade, unless such trade had been carried on. We think the common use of language does not require this. It is not unusual to say, that claims are made, suits brought, and even judgments | rendered, for or on account of a cause of action, without p. 510
meaning to affirm that the cause exists in point of fact. It would surely be no solecism to say, that the General Carrington had been seized for contraband trade, but on examination was found innocent and discharged. We understand the word *cause* in the question, and the words *for or on account of* in the policy, to relate to the motive of the seizers; and that any seizure is for and on account of contraband, which is made because the party bona fide believes such contraband trade to have been carried on. It is a question of good faith; involving of course the question of probable cause on the one hand, and of wanton and lawless violence on the other. It is said, if such be the construction, seizures under mere pretext of contraband trade will discharge the underwriter; and that the motive cannot be proved. We answer, that the question of probable cause is always open to the party, indicative of the motive, and can be tried by a jury as well as in other causes. We think, this construction will reconcile the apparent contradictions of the cases cited. Those in which it is said, that there must have been both illicit trade and a seizure on account of it, arose under exceptions of breaches of foreign municipal laws, where the question was not as to the fact of

trading; but whether the prohibitory law actually existed, and was binding on the party. The case of Church v. Hubbart, so much relied on, was decided on the want of sufficient proof of the alleged law of Spain; and the dicta of the court which have been cited, were mere concessions to counsel, made *arguendo*. Taking the whole opinion in that case together, we think it plainly takes the distinction between bona fide and colourable seizures. This is confirmed by the case of Livingston and Gilchrist v. The Maryland Insurance Company, 7 Cranch 506, 2 Cond. Rep. 589; which turned, like the present, on a question of national law. The court there decided, that an actual breach of the law of nations, was not necessary to discharge the underwriters.

The argument drawn from the proviso of the exception, that the judgment of a foreign consular or colonial court, shall not be conclusive of the fact of contraband goods having been on board, is carried too far. That proviso does not imply, that the fact of such goods having been on board, was thought necessary to the discharge of the underwriter: but
p. 511 only, that a | fact so material in determining the character of the seizure, shall not be conclusively determined by the courts of the captors. It is a fact to be submitted to a jury, to show probable cause for the seizure, or the want of it.

It is admitted, that the language of some of the cases cited, would seem at first to favour the position taken for the plaintiffs; but when taken in connection with the facts before the court, they will be found consistent with the view of the defendants.

In other cases, equally respectable dicta may be found, expressly recognizing the doctrine that actual delinquency is not necessary to discharge the underwriter. Livingston and Gilchrist v. The Maryland Insurance Company; Radcliffe v. The United Insurance Company, 7 Johns. R. 38.

The law of Massachusetts is the lex loci contractus; and in the case of Higginson v. Pomroy, 11 Mass. Rep. 104, this is very clearly stated.

The case of Smith v. The Delaware Insurance Company, was decided chiefly on the ground that the foreign law did not extend to the territory in which the seizure was made. |

Faudel v. The Phœnix Insurance Company, was decided on the ground, that the sentence of the court showed that the seizure was not within the exception. There is no case which refuses to discharge the underwriter under this exception, because the captors have been honestly mistaken in the facts. This point, however, is of little importance to the present case, because there is no dispute about facts.

Mr. Webster, for the defendants, considered the case under three heads. 1. The contract, as to its nature and object. 2. The facts

applicable to the case under the policy. 3. The law growing out of the facts.

1. As to the exception in the policy, and the risks assumed by the undertakers under it; he contended, that they took upon them no risks for or on account of contraband goods, or illicit trade. The words of the exception are the same as if they were in the form of a warranty by the assured. All risks which are fairly to be laid to the account of illicit or contraband trade, were not taken by the insurers, but were to be borne by the owner. The underwriters assumed all sea risks, and the other risks enumerated in the policy. |

The voyage was from Providence to where the outward cargo was p. 512
to be landed. The ship was to enter at Valparaiso under a false pretence —the want of water, and then proceed to Coquimbo, where the risk was to commence on the 5th of June 1824. The ground of the plaintiffs' claim must be for seizure and detention, as all the counts in the declaration allege that as the cause of the loss, except one, which asserts a loss by piratical seizure.

The seizure was the cause of the loss, and this is alleged to have been for contraband or prohibited trade.

Was this the true cause? If it was, the underwriters are excused; but if there was not such a seizure, then the underwriters are liable under the general words in the body of the policy.

There can be no doubt, but that the contraband trade was the cause of the loss: if there had been no contraband trade, there would have been no seizure.

It is said, the seizure was too late; but this is not a question for the underwriters. It is enough that the seizure was actually on account of contraband trade. Probable cause was enough, whether there was cause or not for condemnation. Cited, 3 Wash. C. C. R. 127; Higginson v. Pomroy, 11 Mass. Rep. 104, 110. The contract in the present suit was made in Massachusetts: if there is any discrepancy between the law of different states, the lex loci must govern. The cases in 7 Johns. 38, and 9 Johns. 281, fully sustain the ground assumed for the defendants.

The excuse is that the vessel was not taken in delicto. If this be so, it is a question with which the underwriters have no concern.

But this assertion is denied. When the vessel was seized, a state of facts existed which warranted the seizure and condemnation. The risk was produced by the conduct of the plaintiffs, and was not assumed by the underwriters. By their conduct the vessel was forfeited; and nothing but the form of a condemnation was wanted.

The rule of 1756 is not necessarily involved in the decision of this case; but it is denied that any new rule in international law was then introduced. That rule arose out of the war of | 1756; and it was estab- p. 513

lished to prevent the trade of the Dutch with the French colonies, under Danish licenses.

To show that it was the ancient, and well settled law of nations, that trading in contraband goods forfeited the vessel, cited, 3 Rob. Ad. Rep. 178, and note. The relaxation of the law was, that the articles only should be seized when taken in delicto; excusing the ship and innocent cargo. If there was a fraudulent destination originally, the ancient rule applied; the vessel and the innocent cargo were forfeited on account of the fraud.

When the vessel is forfeited for carrying on contraband trade, you may pursue her until she is taken; but public convenience requires a limit, and that limit is fixed by universal assent, to the end of the voyage. The same rule exists as to all seizures for breach of revenue laws. In Chitty's Law of Nations 128, is the case of a vessel seized on the outward voyage.

There is necessarily a difference as to the right of seizure for illicit trade, and for trade in contraband articles. In the first case, the vessel was in the prohibited port; in the latter, she was not, but is in a neutral port. In the present case, there could not have been a visitation and search; for her false papers showed she was bound to the Sandwich Islands and Canton. If this is a common practice, it is so much the worse. But this can have no operation on the rights or exemptions of the underwriters; for it would have no effect on the right of the belligerent to seize. Cited, 6 Rob. 376, note; The Edward, 4 Rob. 56.

It is insisted, that it is not necessary to show there was cause for condemnation. If there was cause for seizure, it is sufficient under the exception in the policy to discharge the underwriters. In the cases cited for the plaintiffs, it may have been shown there was not cause for condemnation; but in those cases it was considered there was cause for seizure. 3 Rob. 138, 141; 2 Rob. 115; 1 Acton 25, 333.

The sixth point was intended to raise the question, whether the underwriters could be discharged before condemnation. This would delay the question of their liability until a condemnation; and this cannot be.

p. 514 Mr. Sergeant, in reply, stated, that the form of the policy | adopted in this case, has been in use in Boston since 1823; and the exception as to illicit trade, is in all the policies in the United States; the part as to contraband trade only is new. The principle adopted by the clause had long been recognized in the courts of the United States.

The situation of the country at the time of the seizure was peculiar. Chili had actually established her independence. The possession of Rodil was temporary and accidental; and whenever actual possession of any place came into the hands of the officers of Spain, the laws of the Indies applied; and all trade with the place became illegal.

There must be an interpretation of the contract, consistent with the bona fide intentions of both parties to it. The parties had no reference to any thing which had taken place before the policy attached, on the 5th June 1824, at Coquimbo. The policy is dated in October 1824, and was on the property, 'lost or not lost.'

When the policy attached, the vessel had no contraband articles on board, and never afterwards had; and it may be presumed, that the underwriters knew she had some contraband goods on board. She had not the proceeds of the contraband goods on board when she was seized in Quilca by an armed vessel.

The whole of the questions in the case turn on the construction of the clause of exception.

The first question is, whether the seizure was for a justifiable cause. It must be legal and justifiable, or there was no cause at all. The court cannot say, whether the seizure was bona fide. Nor can they say whether there was probable cause or not. They have not the evidence before them. There must be a legal and justifiable cause, or there is no cause.

The clause is not a warranty; it is an exception. A warranty is not of the like effect as an exception. The interpretation of the clause was settled in principle, before it was inserted in policies. It was so settled in 1804, in the case of Church v. Hubbart, 2 Cranch 187, 1 Cond. Rep. 385; which was a Massachusetts case; so 2 Wash. C. C. R. 130, decided in 1807; 3 Serg. and Rawle 74, decided in 1817; 4 Serg. and Rawle 59; 1 Caines's Cases 29, decided in 1801; 2 Johns. Cases 481; Marshall on Insurance 346, published in 1810. | There never has been a decision to p. 515
the contrary. The principle the plaintiffs claim and rest the case upon is, that there must be a legal and justifiable cause of seizure, and one which would justify a condemnation. Higginson v. Pomroy, 1 Mass. 104, when examined, sustains this principle.

The clause allows the contraband trade to be carried on, but at the risk of the assured: and it rests with the underwriters to show that the seizure was for an unlawful and prohibited trade. A mere lawless seizure is not, therefore, within the exception. The law, as understood, made the underwriters liable in a case like this, and the exception was introduced to excuse them.

The specific kind of loss must be by seizure or detention. Mere allegation, of course, will not do. The cause must be shown by a condemnation.

Contraband is a lawful trade, as has been decided in the courts of the United States; and this court will not now pronounce such a trade illegal, and expose the whole vessel and cargo to condemnation. This is the doctrine contended for on the other side.

It is denied that the principle of the law of nations authorises a seizure and condemnation after the goods are landed. The cases cited by the

opposite side, do not support the position ; and it is exclusively British doctrine. There never is an adhering taint when the offending article was lawful, and no proceeds of it on board, or when there is not a false destination ; neither of which existed in this case.

This court would not condemn the cargo for what the vessel had done with respect to contraband. The case of the Santissima Trinidad, 7 Wheat. 292, 5 Cond. Rep. 284 ; and the cases in New York show that contraband trade is lawful.

The fourth question is founded on the assumption, that this was enemy's property. It is admitted, that if it had been, any one may seize. But it is denied to have been enemy's property. It may have been liable to seizure, jure belli ; but this must be under the commission of a regular privateer, when a neutral is concerned. The neutral has the right to claim the benefit of being carried in and tried by a regular tribunal, established by the sovereign of the country. It then becomes the act of the government, which is accountable to the injured party. |

p. 516 The three last questions, in order to be decided in favour of the underwriters, must decide that it is immaterial how, or in what manner the seizure was made, if the trade had been a trading in contraband. Unless the court was legally constituted, the trial and condemnation were nothing, and were absolutely void.

Mr. Justice STORY delivered the opinion of the Court.

After stating the case he proceeded :

This cause comes before the court upon a certificate of a division of opinion of the judges of the circuit court for the district of Massachusetts.

Upon the trial of the cause upon the evidence, the parties propounded certain questions, upon which the circuit court (with the assent of the parties), certified a division of opinion, for the purpose of obtaining the final decision of this court in regard to them.

The first is, whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause. The question here propounded is not whether there must be a legal or justifiable cause for condemnation ; but simply, whether there must not be such cause for the seizure and detention. And we are of opinion, that the question ought to be answered in the affirmative. The language of the exception, when properly construed, leads to this conclusion ; and it is confirmed by authorities standing upon analogous clauses. The language is, ' the assurers shall not be liable for any charge, damage or loss which may arise in consequence of seizure or detention for or on account of illicit trade, or trade in articles contraband of war.' It is not, then, every seizure or detention which is excepted ; but such only as is made for, and on account of a

particular trade. A seizure or detention, which is a mere act of lawless violence, wholly unconnected with any supposed illicit or contraband trade, is not within the terms or spirit of the exception. And as little is a seizure or detention not bona fide made upon a just suspicion of illicit or contraband trade, but the latter used as a mere pretext or colour for an act of lawless violence; for under such circumstances, it can in no just sense be said to be made for or on account of such trade. | It p. 517
is a mere fraud to cover a wanton trespass; a pretence and not a cause for the tort. To bring a case, then, within the exception, the seizure or detention must be bona fide, and upon a reasonable ground. If there has not been an actual illicit or contraband trade, there must at least be a well founded suspicion of it, a probable cause to impute guilt, and justify further proceedings and inquiries; and this is what the law deems a legal and justifiable cause for the seizure or detention. The general words of the policy cover the risks of restraints and detainments of all kings, princes and people. The exception withdraws from it such as are bona fide made for, and on account of illicit or contraband trade. So that, upon the mere terms of the exception, there would not seem any real ground for doubt. But if there were, the next succeeding clause associated with it, demonstrates that such must have been the understanding of the parties. It is there said, that the judgment of a foreign consular or colonial court shall not be conclusive upon the parties as to the fact of there having been articles contraband of war on board, or as to the fact of an attempt to trade in violation of the laws of nations. Now, if a mere lawless seizure or detention, under the pretext of illicit and contraband trade, were within the exception; the inquiry, whether there had been contraband articles on board, or an attempt of illicit trade, would be in most, if not in all cases wholly unimportant and nugatory to the assured, for whose benefit the clause is introduced; since the sentence would always establish a pretence for the seizure and detention, although not a justifiable cause for it. The reasonable interpretation of the clause must be, that it was introduced to enable the assured to disprove the existence of justifiable cause for the seizure or detention, by showing that the facts did not warrant it.

We think that the authorities cited at the bar, lead to the same conclusion. In Church v. Hubbart, 2 Cranch 187, 2 Cond. Rep. 385; where the exception was, 'that the insurers do not take the risk of illicit trade with the Portuguese, and the insurers are not liable for seizure by the Portuguese for illicit trade;' the main question was, whether an attempt to trade, not consummated by actual trading, was within the exception. The court held that it was. On that occasion the chief justice said, 'no seizure, not justifiable under the laws and regulations established by the crown of Portugal for the | restriction of foreign com- p. 518

merce with its dependencies, can come within this part of the contract; and every seizure which is justifiable by those laws and regulations must be deemed within it.' And applying this language to the circumstances of the present case, we may add, that no seizure or detention not justifiable by the law of nations can come within the present exception, and every seizure which is justifiable by the law of nations, must be deemed within it. The cases of Smith v. The Delaware Insurance Company, 3 Serg. and Rawle 74; and Faudel v. The Phœnix Insurance Company, 4 Serg. and Rawle 29; Johnston and Weir v. Ludlow, 1 Caines's Cas. in Error 29; S. C. 2 Johns. Cas. 481,[1] adopt a similar doctrine, if they do not proceed beyond it. The case of Higginson v. Pomroy, 11 Mass. R. 104, contained an exception of 'illicit trade with the Spaniards;' and the court held, that the exception extended to every seizure and detention suggested by the prohibitions of trade and intercourse, as the means of enforcing them; and whether of prevention or of punishment for infraction; and that, therefore, it extended to cases where the charge of illicit trade with the Spaniards might be ultimately repelled; and where the property seized might be in consequence acquitted under the circumstances of the particular case. But this supposes that there was probable or justifiable cause for the seizure, bona fide existing; and the court explicitly assented to the general doctrine in Church v. Hubbart. It is true, that the learned chief justice, in delivering the opinion of the court, added, that '*perhaps* (we may add), although not necessary to the present decision, even arbitrary acts of the Spanish colonial governments, if assumed to be justified on their parts by the prohibitions of trade and intercourse, are, we think, within the exception of seizure for illicit trade.' This is professedly a mere dictum of the court; and giving it every reasonable force as authority, it proceeds on the supposition that such arbitrary acts are bona fide done, and are not mere pretexts to cover an illegal seizure.

The second question is, whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the plaintiffs allege (that is to say, of an armed vessel fitted
p. 519 out and commissioned at Callao | by Rodil), there was a legal and justifiable cause for the seizure of the General Carrington and her cargo. The third is precisely the same in terms, except taking the authority of the armed vessel to be such as the defendants allege (that is to say, to be an armed vessel sailing under the royal Spanish flag, and acting by the royal authority of Spain).

Both these questions present the same general point, whether there was, under the circumstances of the case, a legal and justifiable cause

[1] See also Laing v. United Insurance Company, 2 Johns. Cas. 174; S. C. 2 Johns. Cas. 487; Tucker v. Juhel, 1 Johns. R. 20.

for the seizure and detention of the ship and her cargo. The facts material to be taken into consideration in ascertaining this point are, that the ship, when seized, had not landed all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners; that she sailed on that voyage from Providence with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship; with a false destination and false papers, which yet accompanied the vessel; that the contraband articles had been landed, before the policy, which is a policy on time, designating no particular voyage, had attached; that the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and that the alleged cause of the seizure and detention was, the trade in articles contraband of war by the landing of the powder and muskets already mentioned.

If by the principles of the law of nations there existed under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; then the questions must be answered in the affirmative, that there was a legal and justifiable cause.

According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects them, if captured, in delicto, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter, only when there has been some actual co-operation, on their part, in a meditated fraud upon the belligerents; by covering up the voyage under false papers, and with a false destination. This | is the general doctrine when p. 520
the capture is made in transitu, while the contraband goods are yet on board. But when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband. And the same rule would seem by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established, that it exists only in favour of neutrals who conduct themselves with fairness and good faith in the arrangements of the voyage. If, with a view to practise a fraud upon the belligerent, and to escape

from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers, and with a false destination, the mere deposit of the contraband in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral. In the case of the Franklin, in 1801, 3 Rob. 217, Lord Stowell said, 'I have deliberated upon this case, and desire it to be considered as the settled rule of law received by this court, that the carriage of contraband with a false destination, will make a condemnation of the ship, as well as the cargo.' Shortly afterwards, in the case of the Neutralitet, 1801, 3 Rob. R. 295, he added, 'the modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband goods. The ancient practice was otherwise; and it cannot be denied that it was perfectly justifiable in principle. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose, cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscated for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false
p. 521 destination or false | papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient rule.' The cases in which this language was used, were cases of capture upon the outward voyage.[1] The same doctrine was afterwards held by the same learned judge to apply to cases, where the vessel had sailed with false papers, and a false destination upon the outward voyage, and was captured on the return voyage.[2] And, finally, in the cases of the Rosalie and the Elizabeth, in 1802, 4 Rob. R., note to table of cases, the lords of appeal in prize cases held, that the carriage of contraband outward with false papers, will affect the return cargo with condemnation. These cases are not reported at large. But in the case of the Baltic, 1 Acton's R. 25, and that of the Margaret, 1 Acton's R. 333, the lords of appeal deliberately reaffirmed the same doctrine. In the latter case, sir William Grant in pronouncing the judgment of the court said, 'the principle upon which this and other prize courts have generally proceeded to adjudication in cases of this nature (that is, where there are false papers), appears simply to be this; that if a vessel carried contraband on the outward voyage, she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal;

[1] See also the Edward, 4 Rob. 68.
[2] See the Nancy, 3 Rob. 122; the Christianberg, 6 Rob. 376.

the sentence (of condemnation) of the court below being perfectly valid and consistent with the acknowledged principles of general law.'

We cannot but consider these decisions as very high evidence of the law of nations, as actually administered: and in their actual application to the circumstances of the present case, they are not, in our judgment, controlled by any opposing authority. Upon principle, too, we trust, that there is great soundness in the doctrine, as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and bona fide conduct on the part of neutrals, in the course of their commerce in times of war; and if the latter will make use of fraud, and false papers, to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is | no injustice in applying p. 522
to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated. There are many analogous cases in the prize law, where fraud is followed by similar penalties. Thus, if a neutral will cover up enemy's property under false papers, which also cover his own property, prize courts will not disentangle the one from the other, but condemn the whole as good prize. That doctrine was solemnly affirmed in this court, in the case of the St Nicholas, 1 Wheaton 417, 3 Cond. Rep. 614.

Upon the whole, our opinion is, that the general question involved in the second and third questions, whether there was a legal and justifiable cause of capture under the circumstances of the present case, ought to be answered in the affirmative. The question, as to the authority of the cruiser to seize, so far as it depends upon her commission, can only be answered in a general way. If she had a commission under the royal authority of Spain, she was beyond question entitled to make the seizure. If Rodil had due authority to grant the commission, the same result would arise. If he had no such authority, then she must be treated as a non-commissioned cruiser, entitled to seize for the benefit of the crown; whose acts, if adopted and acknowledged by the crown or its competent authorities, become equally binding. Nothing is better settled both in England and America, than the doctrine, that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a *droit* of the government.[1]

The fourth and fifth questions involve the point as to the authority of Rodil. The fourth is in the following terms. Whether a general in

[1] The Amiable Isabella, 6 Wheat. Rep. 1, 5 Cond. Rep. 1; The Dos Hermanos, 10 Wheat. Rep. 306, 6 Cond. Rep. 109; The Melomane, 5 Rob. 41; The Elsebe, 5 Rob. 174; The Maria Francoise, 6 Rob. 282.

the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command at Callao, and no civil authority existing therein, and cut off by the
p. 523 forces of the enemy | by sea or land from all communication with any superior civil or military officer, could lawfully seize and detain neutral property from contraband trade, if just cause existed for a condemnation thereof. The fifth question is, whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property. These questions are both understood to refer to the supposed authority of Rodil as an officer of the government, to make the seizure in his official capacity. We are of opinion, that no sufficient facts are stated to enable this court to give any opinion as to the nature or extent of the authority of such an officer under the laws of Spain, or his commission from and under the Spanish government. We shall therefore return an answer to them, declaring that they are too imperfectly stated to admit of any opinion to be given by this court.

The sixth and last question is, whether, supposing the ship to have traded in articles contraband of war in the ports of Chili, and to have been seized afterwards in a port of Peru, then under the royal authority, before she had discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular. This question is understood to raise the point, whether, if the seizure and detention be bona fide for and on account of illicit or contraband trade, a sentence of condemnation or acquittal, or other regular proceedings to adjudication, are necessary to discharge the underwriters. We are of opinion that they are not. If the seizure or detention be lawfully made for or on account of illicit or contraband trade, all charges, damages and losses consequent thereon, are within the scope of the exception. They are properly attributable to such seizure and detention as the primary cause, and relate back thereto. If the underwriters be discharged from the primary hostile act, they are discharged from the consequences of it. The whole reasoning in Church v. Hubbart, 2 Cranch 187, presupposes, that if the underwriters be exempted from the risk of a justifiable seizure for illicit trade, they are not accountable for losses consequent thereon, whether arising from a sentence of condemnation or otherwise. |

p. 524 This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and on the points and questions on which the judges of the said circuit court were divided in opinion, and which were certified to this court for its opinion, agreeably to the act of congress in such case made and

provided, and was argued by counsel; on consideration whereof, it is ordered and adjudged by this court, that upon the question so certified by the circuit court for the district of Massachusetts, upon which the judges of that court were opposed in opinion, the opinions of this court be certified to that court as follows, to wit:—Upon the first question, 'whether a seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause.' That it is the opinion of this court, that the seizure and detention, to come within the exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause. Upon the second question, 'whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the plaintiffs allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo.' That it is the opinion of this court, that assuming the facts stated in that question, there was a legal and justifiable cause for the seizure and detention of the ship General Carrington and cargo. Upon the third question, 'whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the defendants allege, there was a legal and justifiable cause for the seizure and detention of the General Carrington and her cargo.' That it is the opinion of this court, assuming the facts stated in that question, there was a legal and justifiable cause for the seizure of the ship General Carrington and cargo. If the armed vessel referred to was lawfully commissioned by Rodil, (upon which this court can pronounce no opinion) then she is to be deemed entitled to make the seizure and detention in the same manner as if she had been commissioned by the royal authority of Spain. But if she was not so commissioned, then the parties making the seizure and detention are to be treated as non-commissioned cruisers, seizing for the government of Spain; | and their p. 525
validity depends upon their adoption and recognition by the competent authorities of Spain, according to the general principles of the law of nations on this subject. Upon the fourth question, 'whether a general in the military service of Spain, subordinate to La Serna, viceroy of Peru, under the king of Spain, but having the actual and exclusive command of Callao, and no civil authority existing therein, and cut off by the forces of the enemy by sea and land from all communication with any superior civil or military officer, could lawfully seize and detain neutral property for contraband trade, if just cause existed for a condemnation thereof.' And the fifth question, 'whether such officer, so situated, has a right to appoint and constitute a court, of which he himself is one, for the trial and condemnation of such property.' That it is the opinion of this court, that the facts are too imperfectly stated to

enable this court to ascertain and decide what are the nature and extent of the powers of such an officer, according to the laws of Spain, or his commission from and under the Spanish government. Upon the sixth question, 'whether, supposing the ship to have traded in articles contraband of war in the ports of Chili, and to have been seized afterwards in a port of Peru, then under the royal authority, before she discharged her outward cargo, for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular.' That it is the opinion of this court, that under the circumstances stated in that question, the underwriters are discharged, whether the subsequent proceedings, after the seizure and detention of the ship and cargo for their adjudication, were irregular or not.

The United States, Appellants, v. Baptiste Guillem, Claimant of one box of specie.

(11 Howard, 47) 1850.

A neutral leaving a belligerent country, in which he was domiciled at the commencement of the war, is entitled to the rights of a neutral in his person and property, as soon as he sails from the hostile port.

The property he takes with him is not liable to condemnation for a breach of blockade by the vessel in which he embarks, when entering or departing from the port, unless he knew of the intention of the vessel to break it in going out.

This was an appeal from the decree of the Circuit Court of the United States for the District of Louisiana, sitting as a prize court.

Baptiste Guillem, a French citizen, was domiciled in Mexico, and had resided there about three years before the war with the United States was declared. His occupation was that of cook in a hotel, and he was engaged in it in Vera Cruz when hostilities with this country commenced. He was not naturalized and had taken no steps to become a citizen of Mexico. He continued in Vera Cruz, pursuing his ordinary business, until he learned that an attack was about to be made on the city, by sea and land, by the forces of the United States. He immediately prepared to leave the country and return to France, with his family, carrying with him all the money he had saved. He intended to embark in the British steamer, which was expected to arrive at Vera Cruz early in March, 1847, and obtained a passport from the French consul for that purpose. But the steamship was wrecked on the island of Cuba, and did not reach Vera Cruz, and Guillem was still in that city when General Scott landed and closely besieged it.

p. 48 The port of Vera Cruz had been blockaded by the naval | forces of the United States from the commencement of the war. When the land forces

arrived, and the siege was about to commence, General Scott and Commodore Perry (who commanded the blockading squadron) agreed to leave the blockade open to the consuls and other neutrals, to pass out to their respective ships of war, until the 22d of March, after which all communication with the besieged city was interdicted.

On the 13th of March, a French vessel called La Jeune Nelly came into the port, having run the blockade. She came in in the daytime, with her colors flying, nor is there any evidence in the record to show that it was known in Vera Cruz that she had come into port without permission from the blockading ships. She sailed again on the 19th of March, bound for Havre, in open day, and without manifesting any desire for concealment, but yet in breach of the blockade. But there was no evidence that Guillem knew she came in or was sailing out in breach of the blockade. Guillem took passage on board of this vessel with his family, and took with him in gold and silver two thousand eight hundred and sixty dollars,—the whole amount of his three years' earnings in Mexico. The Jeune Nelly had no cargo and sailed in ballast. The money of Guillem was not shipped as cargo, nor invoiced, but was taken with him as a part of his personal effects. The money was chiefly in two bags, which were kept in his state-room, but a part of it was in a belt about his person.

The Jeune Nelly was captured by the blockading squadron a few hours after she sailed; and on the night following was wrecked and totally lost on one of the islands near the port; but the passengers, crew, and all the money and property on board, were saved. The passengers and crew were immediately released, and the money of Guillem and other property on board were taken possession of by the orders of Commodore Perry, and sent to New Orleans for adjudication. It was libelled in the District Court, and condemned, as lawfully seized. Guillem appealed from this decree to the Circuit Court, where it was reversed, and the money in question directed to be restored and refunded to him. The captors appealed from this last-mentioned decree to the Supreme Court.

It was argued by *Mr. Crittenden* (Attorney-General), for the appellants, and *Mr. Soulé*, for the claimant.

Mr. Crittenden, for the appellants.

As it has been set up and insisted on that Guillem, in embarking on board the Jeune Nelly, acted under permission of General Scott, it is necessary to ascertain what actually took | place at the time at Vera Cruz. p. 49
The correspondence of General Scott, as to the operations of the army before Vera Cruz, will be found annexed to President Polk's message to Congress of December, 1847, in 1 Senate Documents, p. 216, *et seq.* From this correspondence it appears that the landing of the troops was effected on the 9th of March, and that on the 13th, in answer to a request

of the French and Spanish consuls that in his operations he might respect the persons and property of French and Spanish subjects, he communicated to them, that in carrying the city, whether by bombardment or assault, it would be exceedingly difficult, particularly in the night-time, for his forces to see the consular flags, or to discriminate between the persons and property of friends and the persons and property of the enemy; he could, therefore, only promise to do all that circumstances might possibly permit to cause such discrimination to be observed. He also sent them safeguards under his signature. (p. 219.) By a letter of his to Commodore Perry, of the 22d, it appears that up to that time intercourse had been allowed between the neutral vessels of war and the city and castle of Vera Cruz, but was then put an end to. (p. 228.) And a communication to that effect was made by Commodore Perry to the commanders of the neutral ships of war. (p. 228.) It was not until the 24th that the British, French, Spanish, and Prussian consuls addressed General Scott, praying him to suspend hostilities, and to grant a truce, to enable their countrymen to leave the place with their women and children. (p. 229.) In a despatch to the Secretary of War, under date of the 25th, General Scott says :—'All the batteries, Nos. 1, 2, 3, 4, and 5, are in awful activity this morning. The effect is no doubt very great, and I think the city cannot hold out beyond to-day. To-morrow morning many of the new mortars will be in a position to add their fire, when, or after the delay of some twelve hours, if no proposition to surrender should be received, I shall organize parties for carrying the city by assault. So far, the defence has been spirited and obstinate.

'I inclose a copy of a memorial received last night, signed by the consuls of Great Britain, France, Spain, and Prussia, within Vera Cruz, asking me to grant a truce to enable the neutrals, together with Mexican women and children, to withdraw from the scene of havoc about them. I shall reply, the moment that an opportunity may be taken, to say,—1st. That a truce can only be granted on the application of Governor Morales, with a view to a surrender. 2d. That in sending safeguards to the different consuls, beginning as far back as the 13th instant, I distinctly
p. 50 admonished them, particularly the | French and Spanish consuls, and of course through the two the other consuls, of the dangers that have followed. 3d. That although at that date I had already refused to allow any person whatever to pass the line of investment either way, yet the blockade had been left open to the consuls and other neutrals, to pass out to their respective ships of war, up to the 22d instant. And, 4th. I shall enclose to the memorialists a copy of my summons to the governor, to show that I had fully considered the hardships and distresses of the place, including those of women and children, before one gun had been fired in that direction. The intercourse between the neutral ships of war

and the city was stopped at the last-mentioned date, with my concurrence, which I placed on the ground that that intercourse could not fail to give to the enemy moral aid and comfort.' (pp. 225, 226.)

General Scott accordingly, on the same day, addressed a communication to the consuls of the nature above indicated, in which he says that he deeply regrets the lateness of their application, for up to the 22d instant the communication between the neutrals in Vera Cruz and the neutral ships of war lying off Sacrificio was left open, mainly to allow those neutrals an opportunity to escape from the horrors of the impending siege, of which he gave to the consuls every admonition in his power. (pp. 230, 231.) This communication was made known to the Mexican general, and led to the capitulation.

From the preceding narrative it appears that the only permission to neutrals given by General Scott or Commodore Perry, was to pass from Vera Cruz to the ships of war of their respective nations.

No treaty stipulations between the United States and France, on the subject of blockade, were in existence at the date of these occurrences. There was a convention made between them on the subject, in 1800, but which was to last only eight years. After the expiration of that time, it does not seem to have been renewed.

The cause is now to be heard in the Supreme Court, on an appeal taken by the United States from so much of the decree of the Circuit Court as is in favor of Guillem for the amount claimed by him.

There can be no question that the Jeune Nelly was liable to capture for breach of the blockade, and such was the answer of our own government to that of France, when it made reclamation on behalf of the owner for the value of the vessel. She was guilty of a violation of blockade, both in going into Vera Cruz and coming out of it.

The guilt of a breach inward is not discharged until the end | of the p. 51
return voyage ; and if a vessel is taken in any part of that voyage, she is taken *in delicto*. The Frederick Molke, 1 Rob. 87 ; The Lisette, 6 Rob. 395 ; The Joseph, 8 Cranch, 451.

The act of egress is as culpable as the act of ingress. The case of the Frederick Molke, above cited, is identical with the present. The Vrouw Judith, 1 Rob. 151 ; The Neptunus, 1 Rob. 171 ; The Adelaide, 2 Rob. 111, note. The cases of the Juffrow Maria Schrœder, 3 Rob. 153, and the Welvaart Van Pillaw, 2 Rob. 130, decide that the offence of running a blockade outward is not purged until the end of the voyage, and that until then the vessel so guilty is subject to capture by any cruiser of the blockading power.

There are exceptions in the case of egress. ' A ship that has entered previous to the blockade may retire in ballast, or taking a cargo that has been put on board before the blockade.' The Juno, 2 Rob. 118. That a

belligerent may lawfully blockade the port of his enemy is admitted; but it is also admitted that this blockade does not, according to modern usage, extend to a neutral vessel found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted. Olivera *v.* Union Insurance Company, 3 Wheat. 194; 1 Kent, 147. The Jeune Nelly does not come within either of these exceptions. There are other exceptions, for which see Wheaton's Elements, 548, and 2 Wildman, 201, but which have no bearing in this case.

But to come to the question in the case, Were the property and effects of the neutral Guillem, on board the Jeune Nelly when she broke the blockade outward, liable to capture? The court below has decided they were not, on the ground that Guillem had left Mexico with an intention to return to France, and therefore was no longer a resident of the power with whom the United States were at war. It is a well-known law, that, if a neutral reside in the country of one of the belligerents, his property and effects sent from that country are liable to capture by the other, as enemy's property, wherever found on the ocean. 1 Kent's Com. 75. A national character, however acquired by residence, may be thrown off at pleasure by a return to the native country. It is an adventitious character, and ceases by non-residence, or when a party puts himself in motion, *bonâ fide*, to quit the country, *sine animo revertendi*, and such an intention is essential to enable him to resume his native character. 1 Kent's Com. 78.

But with all due deference it is submitted that these doctrines have no application in a case of capture for breach of blockade. A blockade has the effect to seal and shut up the blockaded port against all trade
p. 52 whatsoever. Sir William | Scott says it would not properly be a blockade unless neutrals were restricted.

'A blockade may be more or less rigorous, either for the single purpose of watching the military operations of the enemy, and preventing the egress of their fleet, as at Cadiz; or on a more extended scale, to cut off all access of neutral vessels to that interdicted place, which is strictly and properly a blockade; for the other is, in truth, no blockade at all, as far as neutrals are concerned. It is an undoubted right of belligerents to impose such a blockade, though a severe right, and as such not to be extended by construction; it may operate as a grievance on neutrals, but it is one to which, by the law of nations, they are bound to submit.' The Juffrow Maria Schrœder, 3 Rob. 154.

The decision in the case of the Vrouw Judith, 1 Rob. 151, which was a case of violation of blockade outward by a neutral, says: 'Now, with respect to the matter of blockade, I must observe that a blockade is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connection

and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of the place, and a neutral is no more at liberty to assist the traffic of exportation than of importation.'

'To shut up the ports of a country, and exclude neutrals from all commerce, is a great inconvenience upon them, although it is one to which they are bound to submit; for there is no principle of the law of nations better established, than that a belligerent has a right to impose a blockade on the ports of his enemy.' The Juno, 2 Rob. 117.

On the part of the United States it will therefore be contended:—

1. That the money of Guillem was liable to capture.

The consequence of a breach of blockade is the confiscation of the ship, and the cargo is always *primâ facie* implicated in the guilt of the owner and master of the ship. 1 Kent's Com. 151.

In the case of the Mercurius, 1 Rob. 84, it is decided that, to make the conduct of the ship affect the cargo, it is necessary to show that the owners of the cargo were conusant of the blockade before the cargo was shipped; or to show that the act of the master binds them.

The blockade of Vera Cruz was established shortly after the declaration of war, in May, 1846. Now Guillem was at that time, and up to the day of his departure, living in the city, and must have daily seen the blockading squadron cruising off the port, and could not pretend ignorance of the blockade. Both | in his claim and examination as a witness, he admits that p. 53
he knew of it; yet, with full knowledge of its existence, and as if in defiance and derision of it, he embarked his property on board. He was, therefore, by his own admission, guilty, and his property is good prize. 'A breach of blockade subjects the property of all those concerned in it to confiscation. The penalty attaches to all those who are privy to the fraud, by themselves or their agents.' 2 Wildman, 203, referring to the case of the Wasser Hundt, Dodson, 27.

But it is said that this money is not good prize, because it was not shipped as cargo. In maritime warfare, private property taken at sea, or afloat in port, is indiscriminately liable to capture and confiscation. Wheaton's Elements, 405.

Besides, money has been recognized by Congress as good prize of war. By the eighth article of the rules and regulations of the navy, (2 Stat. at Large, 46), it is declared: 'That no person shall take out of a prize, or vessel seized as prize, any money, plate, goods, or any part of her rigging, unless it be for the better preservation thereof, or absolutely necessary for the use of any of the vessels of the United States, before the same shall be adjudged lawful prize by a competent court; but the whole, without fraud, concealment, or embezzlement, shall be brought in, and judgment passed thereon, upon pain that every person offending herein

shall forfeit his share of the capture, and suffer such further punishment as a court-martial, or the court of admiralty in which the prize is adjudged, shall impose.'

And by the ninth article it is declared: 'That no person in the navy shall strip off their clothes, or pillage, or in any manner maltreat persons taken on board a prize, on pain of such punishment as a court-martial shall adjudge.'

It has been before remarked, that Lieutenant McLaughlin must have been misinformed as to the money being taken from the persons of the people found on board the Jeune Nelly. Guillem himself admits that, with the exception of the ninety-seven and a half doubloons, it was taken by the boats of the Mississippi from the wreck to that vessel, in buckets, the bags containing it having burst. As to the imputation cast upon an officer who is not named, as to the ninety-seven and a half doubloons, there is not a particle of evidence in the case to sustain it.

2. That no permission had been given either by General Scott or Commodore Perry, at the time Guillem left Vera Cruz, allowing neutrals to leave that port with their property.

By the letters of General Scott and Commodore Perry before referred
p. 54 to, all the permission allowed to neutrals was to | have intercourse with the vessels of war of their respective countries, and even that permission was withdrawn on the 22d of March.

General Scott, in his letter of that date to Commodore Perry, says: 'I have this moment received your note of this date, inquiring whether, in my opinion, it may not be a necessary measure of expediency to stop, for the present, the intercourse heretofore allowed between the neutral vessels of war, off this coast, and the city and castle of Vera Cruz.' General Scott approved of the course suggested.

Commodore Perry, in his letters to the commanders of the foreign vessels of war, on the same day, says: 'The city and castle of Vera Cruz being now closely besieged and blockaded by the military and naval forces of the United States, it has become necessary to prevent all communication from outside, unless under a flag of truce. I am, therefore, constrained to inform you, that all intercourse between the vessels and boats under your command, and that part of the Mexican coast encompassed by the United States forces, must for the present cease.'

General Scott, in his letter to Secretary Marcy under date of the 25th of March, says: 'That, although on the 13th of March I had already refused to allow any persons whatever to pass the line of investment either way, yet the blockade had been left open to the consuls and other neutrals, to pass out to their respective ships of war, up to the 22d instant,' and that this intercourse was then stopped.

General Scott's letter to the consuls is to the same effect, speaking

only of communication between the neutrals in the city and the ships of war of their respective nations.

There is not one word in these letters which affords a pretence to say that neutrals were allowed to ship their property.

This case has been presented as one of hardship. On this subject the court said, in the case of the Joseph, 8 Cranch, 454: 'Although these considerations, if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this court to admit as the basis of its decision.'

Mr. Soulé, for the claimant, made the following points:—

1st. Guillem was a native of France not naturalized, had resided in Mexico only three years, was not a merchant or trader, but only a cook. The money carried by him was not shipped as cargo, did not appear on any manifest, and was his necessary means of support; and was no more to be interfered with than if it had been a bill of exchange or bank-notes. |

2d. As soon as neutrals who reside in an enemy's country turn their back on the enemy's country, they resume their neutral character. Wheaton on Int. Law, 371, 374, 375, 378; 1 Kent's Com. 75, 77, 78. p. 55

3d. Any one has a right to embark, even in a vessel guilty of the violation of the blockade, as a passenger, and himself and his personal effects are not to be interfered with. The guilt of the vessel does not attach to the passenger and his effects. By personal effects are meant his baggage, wearing apparel, and other property attached to his person, in contradistinction to goods and merchandise.

4th. The permission of General Scott to leave Vera Cruz, and repair on board of national vessels, justifies Guillem in going on board of the Jeune Nelly; and his having taken his passport to go by the British steamer in February, 1847, shows that it was not his intention to violate the blockade; and his embarking in the Jeune Nelly must be considered as an act of necessity and distress, there being no other means of leaving Vera Cruz.

First Point. The nationality of Guillem is proved by his own oath, by the testimony of Cassalet, and the passport of the French consul; and the same evidence proves that he was not naturalized, and that his residence had been only three years. Sir William Scott lays it down that the shortest period of time to establish a residence is four years; and all the authorities seem to consider that the rule of residence and identification with the enemy attaches more particularly to the commercial character, and the property captured is always spoken of as cargo or merchandise. In the present case Guillem was a cook; what he had with him was money, which is a personal effect. In countries where no banks exist, a man travels with gold and silver. The most extraordinary

part of this transaction was, that Guillem had ninety-seven and a half doubloons in his pocket ; and when invited to change his clothes, which were wet, and he was emptying his pockets for that purpose, an American officer who had proffered him the change of clothes laid his hand upon the money. A cook, no more than any other person, can travel with a wife and children without money. The present case bears not the slightest analogy to the case of Henry Rogers et al. and United States *v.* The American Schooner Amado. In that case, Rogers had resided thirteen years in Mexico, and still remained there. The cargo was taken in a vessel sailing under Mexican colors, which was owned by Rogers, who was a merchant. His residence, the nature of the cargo, and the
p. 56 circumstances under which it was captured, all stamped the | vessel and cargo as Mexican. It has been said by an able writer, that truth depends upon distinction, and that law is the science of distinction. It is impossible for a mind accustomed to discrimination not to perceive the most manifest distinction between the two cases.

Second Point. The second point is fully sustained by the authorities cited ; and we have only to inquire whether the facts of the case bring Guillem within the exception laid down in the law. Sir William Scott, in the case of the Harmony (2 Rob. Adm. 324), says : ' Time is the grand ingredient in constituting domicile.' In most cases it is unavoidably conclusive ; and in that case that eminent person decided that four years were sufficient to fix the domicile of the party. In the case of the Indian Chief, determined in 1800, Sir William Scott said (Wheaton on Int. Law, 371) : ' Taking it to be clear that the national character of Mr. Johnson, as a British merchant, was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held that, from the moment he turned his back on the country where he had resided, on his way to his own country, he was in the act of resuming his original character, and must be considered as an American. The character that is gained by residence ceases by non-residence. It is an adventitious character, and no longer adheres to him from the moment that he puts himself in motion, *bonâ fide*, to quit the country, *sine animo revertendi*.' In the case of the Ocean, determined in 1804, Sir William Scott says (Wheaton on Int. Law, 375) : ' It would, I think, be going further than the law requires, to conclude this person by his former occupation, and by his constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal. On sufficient proof being made of the property, I shall be disposed to hold him entitled to restitution.' Again, in the case of the Drie Gebroeders (Wheaton on Int. Law, 375), Sir William Scott observes, that ' pretences of withdrawing funds are, at all times, to be watched with considerable jealousy ; but when the transaction

appears to have been conducted *bonâ fide* with that view, and to be directed only to the removal of property which the accidents of war may have lodged in the belligerent country, cases of this kind are entitled to be treated with some indulgence.' Wheaton, Int. Law, 378, says: 'But this national character which a man acquires by residence may be thrown off at pleasure by a return to his native country, or even by turning his back on the country in which he resided, on his way to another. The reasonableness of this rule can hardly be disputed.| Having once acquired p. 57
a national character by residence in a foreign country, he ought to be bound by all the consequences of it until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, *bonâ fide*, and without an intention of returning. If any thing short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable that the evidence of a *bonâ fide* intention should be such as to leave no doubt of its sincerity.' The same doctrine is recognized by Kent, as being the rule of decision in the courts of the United States. See Kent's Com. 75, 77, 78, and the authorities there cited.

Guillem comes completely within the rule. The war between Mexico and the United States broke out very unexpectedly in May or June, 1846, without formal declaration, and more resembled the incursions of our aborigines than the usual mode of making war adopted in a civilized country. Commissioners to make peace accompanied our invading army, and no one could realize that there was to be any permanent war between the United States and Mexico, and proposals of peace were expected to accompany every despatch. It was fully expected that, when the Northern army should reach Monterey, the war would certainly come to a close. These circumstances fully explain and account for the stay of Guillem from June, 1846, to February, 1847. Some time might be necessary to collect what was due to him ; his term of contract might not have expired, and the blockade itself interposed a difficulty against leaving Vera Cruz, for it was not possible to leave Mexico and go to a neutral country otherwise than by sea. But as soon as it was found that the war had assumed a permanent character, that an army had been sent to invade Mexico, Guillem resolved to leave with his wife and children, and the result of their industry and economy, and accordingly prepared to embark in February in the British steamer. The wreck of that vessel on the island of Cuba defeated his intention. His own statement and that of Cassalet of the manner in which La Jeune Nelly entered Vera Cruz, in open day in fine weather, on the 13th of March, might well induce him to believe that she had entered by permission. This was the very day on which, according to General Scott's despatch, he had given permission to neutrals to withdraw. This communication had doubtless

been made known to the French naval authorities. It does not appear that La Jeune Nelly took in cargo ; and for aught we know she might have considered herself within the permission granted by General Scott, with the consent of Commodore Perry, to leave the blockade open to the
p. 58 consuls and other neutrals, to pass out to their respective | ships of war, up to the 22d of March. If the blockade was left open to neutral persons to pass out, it was surely left open for the neutral vessels which should convey them ; and the guilt of La Jeune Nelly in running the blockade, if indeed she did run it, was purged by the permission thus given to neutrals to pass out in neutral vessels, and was the reason why La Jeune Nelly left Vera Cruz on the 20th of March in open day, with her colors flying and fearless of interruption. And this is the reason why the capture of that vessel and her shipwreck have been made cause of claim against the government of the United States. And surely, under these circumstances, the property of Guillem, a neutral who left Vera Cruz with the blockade open, cannot be condemned. La Jeune Nelly was on her way from Vera Cruz to Sacrificios when she was captured and wrecked ; and if neutrals were permitted to go to Sacrificios, their movements afterwards cannot be controlled. All these circumstances should be construed very favorably towards a party so peculiarly situated.

Third Point. But admitting that La Jeune Nelly had violated the blockade, and that the permission of General Scott and Commodore Perry to neutrals to depart did not purge the violation, and that she was a guilty vessel, and with her cargo was subject to condemnation, it is contended for the claimant, that this guilt and liability to condemnation do not in any manner extend to a passenger and his effects. The French crew of La Jeune Nelly could not be made prisoners of war, nor punished in any other manner, nor could their personal effects be confiscated ; *a fortiori* could not those of a passenger. The decided cases settle beyond dispute, that the person and property of a neutral, withdrawing himself after the breaking out of war from the enemy's country, even on board of an enemy's vessel, are not subject to condemnation. The flag does not protect any enemy's property in neutral bottom, and neutral property, if not contraband of war, is not condemned by the character of the flag or of the bottom ; and if, in place of being gold and silver, the currency of the country and the personal effects of the neutral, Guillem had converted his property into any of the productions of Mexico, and sailed in a Mexican vessel with his family, and with the undoubted purpose of withdrawing himself from the Mexican dominions, his property would not have been liable to condemnation. This point is fully established by the case of the Indian Chief, above referred to.

If the argument has satisfied the court that Guillem's three thousand dollars, the earnings of his three years' labor, can in no proper sense of

the words of the English language be called cargo, but are, and are to be considered as, the baggage and | personal effects of Guillem, it is impossible p. 59
to conceive how the conclusion is ever to be arrived at, that they are subject to condemnation because he embarked in a guilty vessel. In favor of neutrals, the laws of war are to be strictly construed. A neutral vessel, violating a blockade, and her cargo, are to be condemned as prize of war; but was it ever heard of that the neutral individuals were made prisoners, their watches taken from their pockets, or their money from their purses? No such case can be produced, and the judge would be considered as having a *furor* for condemnation, who should establish the precedent. Whether or not gold and silver are to be considered as merchandise in regard to the laws of war, will depend on the purposes for which they are shipped. If sent for the purpose of paying a debt, or for the purpose of purchasing merchandise, they may well be considered as cargo; but if carried by a man who is emigrating to a foreign country or returning to his own, and used as the means of taking his property along with him, they cannot be considered as cargo. Every case of this kind must depend on the circumstances which surround it. Guillem leaving Mexico with his wife and children, ignorant of commerce and not confiding in the engagements of merchants, and perhaps unable to procure them, carried with him his small fortune, in the only shape and form of money with which he was familiar. Is there no difference between money carried as the personal property of the passenger, and money shipped for the ordinary purposes of commerce? If this distinction be made, it is impossible to understand how the three thousand dollars of gold and silver carried by Guillem, one half of it on his person, can be condemned as the cargo of La Jeune Nelly.

Fourth Point. The statement of this point carries its own argument with it. If the blockade was raised for the purpose of permitting neutrals to go on board of the neutral ships of war, it is to be supposed they would be permitted to carry their clothes, personal effects, baggage, and money with them. We must suppose that they could have gone to the neutral ships of war either in cutters or other small craft of those vessels, or in Mexican craft. It was to be supposed that General Scott and Commodore Perry were in good faith in giving this permission, and in raising the blockade for the escape of neutrals, and so long as neutrals took advantage of this permission in good faith, and did not attempt to cover Mexican property, our courts would respect and enforce the rights thus conferred. The libel in the present case is said to be for the benefit of the officers and men of the vessels of the squadron in the Gulf of Mexico. This squadron was commanded by Commodore Perry, and neither he, his officers, nor men will be allowed to profit by the breach of the permission thus given to neutrals to withdraw | themselves. When once on board of the neutral p. 60

ships of war, the neutrals are at liberty to go where they please ; whether the raising of the blockade extended to La Jeune Nelly or not, is a question which remains to be settled between the governments ; but it is presumed that the courts will compel respect to such a permission given by the commander of the naval and land forces of the United States. In every point of view, therefore, in which the case can be considered, it is believed that this court will affirm the judgment of the Circuit Court, and will decree that the costs be paid out of that part of the property seized which was condemned.

Mr. Chief Justice TANEY delivered the opinion of the court.

There is no dispute about the material facts in this case. The claimant was a citizen of France who had been domiciled in Mexico about three years, following the occupation of a cook in a hotel, and was returning with his family to reside in his own country when the capture was made. They sailed from Vera Cruz in a French vessel bound to Havre. The money he had with him, and which is now in question, was not shipped as cargo, or for the purposes of trade. It amounted to only two thousand eight hundred and sixty dollars ; and was the earnings of his industry in Mexico, and taken with him for the support of himself and his family upon their return to France. The hostile character which his domicile in Mexico had impressed upon him and his property had therefore been thrown off ; and as soon as he sailed from Vera Cruz he resumed the character of a French citizen, and as such was entitled to the rights and privileges of a neutral, in regard to his property, as well as in his person. The rights of the neutral in this respect have always been recognized in the prize courts of England, and were sanctioned by this court in the case of the Venus, 8 Cranch, 280, 281. Indeed, we do not understand that the appellants claim to have this money condemned upon the ground that it was liable to be treated as the property of an enemy, on account of the previous domicile of Guillem. But it is insisted that, if it is regarded as the property of a neutral, it was shipped in violation of the blockade ; and that the character of the vessel in which it was found also subjects it to condemnation.

So far as concerns the breach of blockade, the attempt to pass out of the port with this money was not of itself an offence, apart from the vessel in which he sailed. The blockade had been opened for the purpose of enabling consuls and other neutrals to pass out to their respective ships of war, soon after General Scott landed and invested the town. And it
p. 61 continued open for that purpose until the 22d of March. It is | true that the permission was confined to ships of war. But the reason is obvious. They were the only vessels that could be safely allowed to communicate with the town then closely besieged. And the permission was restricted to them, because it was believed that commanders of national vessels

would not suffer a privilege granted to neutrals from motives of humanity to be used for improper purposes.

But the object and intention of this order were evidently, not merely to enable the neutral to avoid the hazards of the approaching bombardment, but to afford him an opportunity to leave the enemy's country, and return to his own, if he desired to do so. The neutral was not required or expected to remain on board the ship of war. The permission opened to him a path by which he might escape altogether from a country about to be visited with the calamities of war. It therefore necessarily carried with it the permission to take with him the means of supporting himself and his family, on their voyage home and after their return. The order contains no restriction upon this subject, and to imply any would be inconsistent with the motive by which it was evidently dictated. The Jeune Nelly, in which the claimant embarked, sailed on the 19th of March, while the blockade was still open for the purposes above mentioned. It was no breach of the blockade, therefore, for the claimant to pass out of the town at that time on his voyage home, and to take with him the sum of money his industry had accumulated, and which was necessary for the support of himself and his family on their arrival in their own country. The port was not then closed against the egress of neutrals from the hostile country; nor were they forbidden to take with them the money necessary for their support. And if Guillem had gone on board a French ship of war for the purpose of returning home, and taken with him this small sum of money, his right to do so could not be questioned.

But it is supposed that the character of the vessel in which he embarked subjects his property to forfeiture. La Jeune Nelly had entered the port in violation of the blockade; and endeavored to break it a second time by leaving the port without permission. She was undoubtedly liable to capture and condemnation. But it does not by any means follow, that the property of the claimant is implicated in the guilt of the vessel, or must share in the punishment. There is no evidence to show that he had knowledge of the previous breach of blockade, or of the intention to break it again in going out. She was a neutral vessel belonging to his own country, and had come into the port in open day under the French flag; and she sailed again in a manner equally open, and without any apparent design of concealing her movements from the blockading p. 62
squadron. The permission granted by the American commanders had as a matter of course been made public in Vera Cruz; and Guillem must without doubt have seen citizens of neutral nations daily leaving the city for the ships of war and taking with them the necessary means of support for themselves and their families. He appears to have done nothing more than avail himself of the most convenient opportunity

that offered in order to accomplish the same object; and if he did not participate in the design of breaking the blockade, his property is not affected by the misconduct of the vessel in which it was shipped. Even in the case of cargo shipped as a mercantile adventure, and found on board of a vessel liable to condemnation for a breach of blockade, although it is *primâ facie* involved in the offence of the vessel, yet, if the owner can show that he did not participate in the offence, his property is not liable to forfeiture. This is the rule as stated by Sir William Scott in the case of the Alexander, 4 Rob. 93, and in the case of the Exchange, 1 Edwards, 39, and recognized in 1 Kent's Com. 151. And yet, in the case of a cargo shipped for the purposes of commerce, the breach of blockade is almost always committed by the vessel for the benefit of the cargo, and to carry out some mercantile speculation injurious to the rights of the belligerent nation whose ships are blockading the port. The case before us is a stronger one in favor of the claimant than that of the innocent owner of a cargo. The money in question was not shipped as cargo or as a mercantile adventure. Guillem was a passenger on board, with his whole family, and the money was a part of his personal effects necessary for their support and comfort. The shipment of the money could give no aid or comfort to the enemy. And in taking his passage in the Jeune Nelly, his intention, as far as it can be ascertained from the testimony, was merely to return to his own country, in a mode better suited to his humble circumstances and more convenient to his family, than by passing through the ships of war. In the opinion of the court, the money he took with him was not liable to condemnation on account of the guilt of the vessel, and the decree of the Circuit Court is therefore affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed.

Juan Bautista Jecker, Luis Jecker, Thomas de la Torre, Geidero de la Torre, and Jose E. Fernandez, Merchants, trading under the name and style of Jecker, Torre & Company, Appellants, v. John B. Montgomery.—And John B. Montgomery, Appellant, v. Juan Bautista Jecker, Luis Jecker, Thomas de la Torre, Geidero de la Torre, and Jose E. Fernandez, Merchants, trading under the name and style of Jecker, Torre & Company.

(13 Howard, 498) 1851.

During the war with Mexico, the Admittance, an American vessel, was seized in a port of California, by the commander of a vessel of war of the United States, upon suspicion of trading with the enemy. She was condemned as a lawful prize by the chaplain belonging to one of the vessels of war upon that station, who had been authorized by the President of the United States to exercise admiralty jurisdiction in cases of capture.

The owners of the cargo filed a libel against the captain of the vessel of war, in the Admiralty Court for the District of Columbia. Being carried to the Circuit Court, it was decided :

1. That the condemnation in California was invalid as a defence for the captors.
2. That the answer of the captors, having averred sufficient probable cause for the seizure of the cargo, and the libellants having demurred to this answer, upon the ground that the District Court had no right to adjudicate, because the property had not been brought within its jurisdiction, the demurrer was overruled, and judgment was entered against the libellants.

The judgment of the Circuit Court, upon the first point, was correct, and upon the second point, erroneous.

The Prize Court established in California was not authorized by the laws of the United States or the laws of nations.

The grounds alleged for the seizure of the vessel and cargo in the answer, viz., that the vessel sailed from New Orleans with the design of trading with the enemy, and did, in fact, hold illegal intercourse with them, are sufficient to subject both to condemnation, if they are supported by testimony.

And, if they were liable to capture and condemnation, the reasons assigned in the answer for not bringing them into a port of the United States and libelling them for condemnation, viz., that it was impossible to do so consistently with the public interests, are sufficient, if supported by proof, to justify the captors in selling vessel and cargo in California, and to exempt them from damages on that account. |

The Admiralty Court in the district had jurisdiction of the case, and it was the duty p. 499
of the court to order the captors to institute proceedings in that court, to condemn the property as prize, by a day to be named in the order ; and in default thereof, to be proceeded against upon the libel for an unlawful seizure.

The Admiralty Court, in the District of Columbia, had jurisdiction of such a libel for condemnation, although the property was not brought within its jurisdiction ; and, if they found it liable to condemnation, might proceed to condemn it, although it was not brought within the custody or control of the court.

The necessity of proceeding to condemn as prize, does not arise from any difference between the Instance Court and the Prize Court, as known in England. The same court here possesses the instance and prize jurisdiction. But because

the property of the neutral is not divested by the capture, but by the condemnation in a prize court; and it is not divested until condemnation, although, when condemned, the condemnation relates back to the capture.

As this libel is for the restitution of the property or the proceeds, probable cause of seizure is no defence. It is a good defence against a claim for damages, when the property has been restored, or lost after seizure without the fault of the captor. But, while the property or proceeds is withheld by the captor, and claimed as prize, probable cause of seizure is no defence.

The Circuit Court, therefore, erred in deciding that probable cause of seizure was a good defence.

THESE were appeals from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington.

The facts are fully stated in the opinion of the court.

The cases were argued together by *Mr. Coxe* and *Mr. Nelson*, for Jecker, Torre & Company, and by *Mr. Key* and *Mr. Johnson*, for Captain Montgomery.

The arguments on both sides took a wide range, and it is impossible to insert the entire views of the case taken by the respective counsel. The following are given as those bearing upon what appear to be the principal points.

The arguments were divided into two heads:

1st. The ground of defence taken in the answer of the respondent, that the property had been carried into the port of Monterey, a town in California, then occupied by the American forces, within the limits of Mexico, and there had been regularly proceeded against and condemned as prize of war, by a court exercising at that place admiralty jurisdiction.

The libellants demurred to this plea or defence, and both the District and Circuit Courts sustained the demurrer; and from this decision the respondent appealed. The arguments of the counsel upon this branch of the case, although of an interesting character, are omitted for want of room.

The second demurrer was also to a part of the answer, and was as follows:

'The libellants, as to so much of the answer of the respondent, filed in this case, as alleges and sets up any act or thing on the part of the captain and crew of the said ship Admittance, or any of omission or
p. 500 commission of any sort or kind, as a justification | of the said seizure of said ship or her cargo as lawful prize of war, or which might amount to probable cause of said seizure, demurs to the same; and for cause of demurrer avers and says, that this court in this cause has no rightful jurisdiction or authority to examine or adjudicate upon any question of prize, or of probable cause of capture as prize of war, but that the same belongs exclusively to the courts of the United States exercising prize jurisdiction, and having within its jurisdiction and control the property so seized or captured as prize, which this court has not, and, in consequence

of the tortious and illegal acts of said respondent, as alleged and set forth in said libel, cannot have.

'Wherefore, and for other causes, these libellants do demur to so much of said answer as is above set forth.

'COXE, *Advocate and Proctor for Libellants.*'

This demurrer was also sustained by the District Court, but the judgment was reversed by the Circuit Court, and from this decision the libellants appealed.

Upon this point the argument of the counsel for the libellants was as follows:

The respondent, however, insists that he has in this action a right to show—

1. An actual and sufficient case of prize of war, as a bar to the remedy asked in the libel.

2. Probable cause of seizure, as a bar to the action.

1st. This is a civil suit to recover back property originally belonging to libellants, of which they have been forcibly divested by defendants, under whose authority it has been sold and converted into money. Can the party in such a suit aver legal cause of capture and condemnation as prize without producing a valid decree of condemnation as prize by a court of competent jurisdiction?

If he can, then this singular anomaly and most dangerous precedent will be exhibited, that a captor may disregard the injunctions of the law, and his own paramount duty; omit to bring his prize into court; to institute prize proceedings;—but may retain the property in his own hands, or at his pleasure convert it into money; and when called upon to answer in a civil suit, set up as a defence an original cause of condemnation.

It will scarcely be doubted that the jurisdiction of the prize courts, in cases of prize, is exclusive. The nature and extent of this jurisdiction, as it exists in England, are distinctively given by Lord Mansfield in Lindo *v.* Rodney, Dougl. 613. 1 Kent, 353; Conkl. 354; Dunl. Ad. Pr. 26; 12 Wheat. 1, 11. In every respect it differs from the ordinary Court of Admiralty. 'The manner of proceeding is totally different, the whole system of | litigation and jurisprudence in the Prize Court is p. 501
peculiar to itself; it is no more like the Court of Admiralty than it is to any court in Westminster Hall.' See particularly the language of Lord Mansfield, p. 616.

The claimant of the property cannot himself institute prize proceedings. They must always be had in the name of the government, to whom all prizes *primâ facie* belong. The only remedy the captured has is by monition, a proceeding *in personam* to compel the captors to perform their duty.

The ordinary Court of Admiralty has no more authority to condemn a prize than a court of common law; and should the doctrine asserted for this defendant prevail, these singular results must inevitably follow—

1st. The captors can never acquire any legal right to the property, unless by a decree of a prize court. This is, throughout, recognized in Home *v.* Camden, in 1 H. Bl. 476; 4 T. R. 382; and especially in 2 H. Bl. 541, 542, in the unanimous opinion of the twelve judges.

2d. The United States can assert no right, for its right depends also upon a sentence of condemnation, which alone can divest the former title.

3d. The original proprietor is forbidden by this doctrine from asserting his title.

The only party in whom the law recognizes a title, is forbidden to assert it, and the government, and the sub-officers and crew of the capturing vessel, have no rights cognizable in a court. This property, therefore, on this doctrine, must remain in the hands of the present defendant, subject to no responsibility.

The only mode of avoiding these absurd consequences is to enforce the law as above stated. 2 Wheat. Appx. 9. When a ship is captured, it is the duty of the captors to send her into some convenient port for adjudication. Citing the Huldah, and other cases; the Mentor, 1 Rob. 151; the Susanna, 6 Rob. 48.

In the Madonna del Burso, (4 Rob. 171,) Sir W. Scott says:— 'However justifiable the seizure may have been, the first obligation which the seizor has to discharge, is that of accounting why he did not institute proceedings against the vessel and cargo immediately; and unless he can exculpate himself with respect to delay in this matter, he is guilty of no inconsiderable breach of duty. It would be highly injurious to the commerce of other countries, and disgraceful to the jurisprudence of this, if any persons, commissioned or non-commissioned, could lay their hands upon valuable ships and cargoes in our harbors, and keep their hands upon them without bringing such an act to judicial notice in any manner for the space of three or four months.' |

p. 502 'A belligerent nation which is in the exercise of these rights of war, is bound to find tribunals for the regulation of them; tribunals clear in their authority, as well as pure in their administration; and if from causes of private internal policy, arising out of the peculiar relation of the component parts of the belligerent State, difficulties arise, the neutral is not to be prejudiced on that account; he has a right to speedy and unobstructed justice, and has nothing to do with such difficulties created by questions of domestic constitution.' Id. 177.

This view furnishes an answer to the suggestion of the necessity of creating and resorting to such a court as was erected in California. So,

in page 147, will be found an equally decisive answer to the suggestion of counsel, that the master of the Admittance appeared before the Alcalde at Monterey. These libellants were not present, nor had the captain any authority to represent them; and he, as Sir W. Scott says, 'only followed where he was led.'

In the case of the St. Juan Baptista, (5 Rob. 33,) the prize was brought into England on the 12th of August, and proceedings were instituted on the 12th September, and the court held that it was bound to require a satisfactory cause for this delay. 'Grievous,' says Sir W. Scott, 'would be the injury to neutral trade, and highly disgraceful to the honor of our country, if captors could bring in ships at their own fancy, and detain them any length of time without bringing the matter to the cognizance of a court of justice. In the present instance this first and fundamental duty has not been performed.' 'Persons venturing to take out a commission of war must instruct themselves in their own duty, and if any inconvenience arises from their neglect, the neutral claimant is not to suffer.' In the case at bar, no prize proceedings have to this day been instituted; this fundamental duty, as Sir W. Scott calls it, has been wholly neglected. The property has never been brought within the United States,—another fundamental duty. The papers and documents on board have never been transmitted to any District Court, a peremptory requisition of the law is thus disregarded. It is intimated they are in the possession of the Navy Department. How did the captors procure them from the pseudo court at Monterey, and under what authority are they lodged in the Navy Department? The property no longer remains specifically; it has been converted into money, and no prize court can now proceed to adjudication.

In the Wilhelmsberg, (5 Rob. 143,) the same learned judge, observing upon the duty of the captor to send his prize to some convenient port, says that 'in that consideration the convenience of the claimant, in proceeding to adjudication, is (among) | one of the first things to which p. 503
the attention of the captor ought to be addressed.' 'He considered that the port selected in that case was not such a port, a place where the captor cannot get advice, much less can the claimant learn in what manner to proceed, or where to resort for justice.'

If such was the character of that port, what shall be said of Monterey, a place not within the jurisdiction of any court of the United States; a port of the very enemy with whom we were at war, occupied, it is true, so far as their guns could reach, by an American force; where no tribunal existed which could direct its process, or exercise jurisdiction; no judge responsible for the performance of judicial function; where the protecting arm and supervising power of the Circuit or Supreme Court could not reach; where no counsel could be found competent to give correct

advice. How infinitely further from the shadow of right than in the case of the Wilhelmsberg, already cited, or that of the Lively, (1 Gall. 315,) where the court condemned the captor for carrying the property captured in the neighborhood of Machias River, to Salem. The Lively was a case in which the claimants had filed a libel for restitution, as here, and in which a monition to proceed to adjudication issued against the captors, who accordingly libelled the property as prize. It was not attempted there, as here, to bar the relief sought in the Instance Court by setting up a lawful cause for condemnation as prize of war, or a probable cause to justify the seizure. Before that learned court no such ground of defence would be offered or admitted. There it was the well-known law, that the Prize Court could only alone adjudicate upon these questions.

Had the captured property been brought within the jurisdiction of the District Court, having power to proceed as in a prize case, and such proceedings had been commenced, the claimant might have proceeded by petition in that court to compel the captors to proceed to adjudication. Such was the course in the case of the William, 4 Rob. 214. When, however, the property is beyond the jurisdiction of the Prize Court, so that no prize jurisdiction can be exercised, then a monition issues from the instance side of the court, proceeding personally against the captors, commanding them to perform the duty enjoined on them by law, or to restore the property.

It must be borne in mind, that in this case no claim is presented for vindictive damages; the captor is not sought to be molested for his acts of wrong, or for his omission to perform a duty. The simple demand is, that, having seized our property, having failed to perform the fundamental duty imposed on him by law, having failed to show his right to capture, having omitted to permit us to assert our rights and maintain
p. 504 our innocence | in the only court having jurisdiction to decide the question of prize, he shall restore the property specifically; or if he has put it out of his power by any means, of doing this, then that he shall respond in value. Our proceeding is more nearly assimilated to the common-law actions of trover or replevin, than of trespass. The issue presented is simply of a right to property. If the property belongs to libellants, they are entitled to a decree of restitution; if that property has been divested, and the right now belongs to the defendant, he is entitled to judgment.

This conclusion cannot be avoided by adopting a principle asserted by the learned counsel for the respondent, viz., that condemnation as prize is not necessary to vest the title to the property captured, in the captors. He asserts that a forfeiture attaches *in rem*, when the offence is committed, and the property is instantly divested.

(The counsel then proceeded to comment upon this position, and concluded as follows.)

If, in this proceeding, the question of prize cannot be raised, or decided; if the court cannot proceed to condemn, and therefore, will not permit defendant, collaterally and incidentally, to avail himself of such a ground of defence, as little ground is there for the analogous defence upon which the Circuit Court seems to have rested that portion of the decree from which we have appealed, viz., that the pleadings disclose a case of probable cause of capture which justified the seizure and bars this action.

This point, it is believed, was not argued in the court below, but was gratuitously taken by the learned judges themselves, the chief judge not sitting in the cause.

It is apprehended, that in deciding this to be a bar to the action, the whole principle of the law as to probable cause, has been lost sight of. Probable cause is recognized as a justifiable ground of seizure, either as prize *jure belli*, or for a statute forfeiture. In the first class of cases, where the capture has been made as prize of war, the general principles of the law of nations provides this defence; where made for an alleged forfeiture under a statute, such protection must be conferred by statute, or it is not available. But, whether in the one case or the other, these principles are believed to be incontrovertible and universal.

1. The question of probable cause belongs exclusively to the court which has jurisdiction to condemn or to decree forfeiture.

2. It can be adjudged in that court only in a proceeding to obtain condemnation.

3. Only in such court, after a decree refusing condemnation and directing restitution. |

4. The only legal operation of a certificate of probable cause is to p. 505
bar a recovery of damages for an unlawful seizure.

The general principles which govern cases of this character, are embodied in our statute book. 1 Stat. at Large, 696, 122. The 89th sect. of the act of March 2, 1799, provides for cases of seizures under the collection laws, and enacts that 'when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, &c., and judgment shall be given for the claimant or claimants; if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof, and in such case, the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit, or judgment, on account of such seizure and prosecution.' Similar provisions may be found in other statutes inflicting forfeitures.

The act of June 26, 1812, (2 Stat. at Large, 759, c. 107,) concerning letters of marque, prizes, and prize goods, in its 6th section, provides 'that before breaking bulk of any vessel which shall be captured as aforesaid, or other disposal or conversion thereof, or of any article which shall be found on board the same, such captured vessel, goods, or effects, shall be brought into some port of the United States, and shall be proceeded against before a competent tribunal; and after condemnation and forfeiture thereof, shall belong to the owners and captors thereof, and be distributed as aforesaid; and in the case of all captured vessels, goods, and effects, which shall be brought within the jurisdiction of the United States, the District Courts of the United States shall have exclusive original jurisdiction thereof, as in civil cases of admiralty and maritime jurisdiction; and the said courts, or the courts being courts of the United States, into which said cases shall be removed, and in which they shall be finally decided, shall and may decree restitution in whole or in part, when the capture shall have been made without just cause; and, if made without probable cause, or otherwise unreasonably, may order and decree damages and costs to the party injured.'

These provisions embody the correct doctrine of the law relating to probable cause; and it is confidently asserted that no case can be produced in which even a certificate of probable cause, given by a court exercising exclusive jurisdiction, was ever thought to present a bar to a claim for restitution of property.

The argument of the counsel for the respondent, viz., the competency of the court in California, is omitted.

p. 506 Upon the question presented by the second demurrer, viz., | 'Can the respondent defend himself in this suit by the matters and things stated in his answer?' a part of the argument of the counsel was as follows.

It is contended, by the learned counsel for the libellants, that the respondent cannot defend himself in this suit by showing any 'act or thing on the part of the captain or crew of the ship Admittance, or any act of omission or commission of any sort or kind as a justification of the said seizure of said ship or her cargo, as lawful prize of war, or which might amount to probable cause for said seizure, etc.'

It is thought this position cannot be maintained; it indicates a fear upon the part of the libellants, themselves admitted wrongdoers, to meet the respondent upon fair ground, the merits of the case. They ask for heavy damages, and at the same time admit that they accrued by reason of their own illegal acts.

What is there in the nature of this suit that should exclude the defence set up by the respondent? What is the injury complained of? It is, as stated in the libel, that the respondent, 'without any lawful

cause or probable cause of suspicion,' seized and took possession of the ship Admittance, her cargo, and papers, and that the same were not brought nor sent within the jurisdiction of any court of the United States for adjudication, and that the libellants 'have been, for more than a twelvemonth, deprived of the use, possession, management, and control of the said property,' and that the same has been 'illegally sold and disposed of.' The remedy pursued, is a proceeding instituted to compel the respondent to bring in the property, and proceed to adjudication, or in default thereof, that restitution in value should be decreed against him. It is a very common proceeding in the admiralty courts, and by looking into its nature and object, it will be perceived that the defence contended for, is necessarily granted. It will be found that the mere failure of a captor to proceed to adjudication, is not enough to entitle a claimant to restitution in value, but that the court will look back to the original cause of seizure, and if the claimant has violated any law which rendered his property liable to condemnation, restitution in value will not be decreed.

Various authorities are cited to show that the distinction between the prize and instance side of the District Courts, as Courts of Admiralty, has an important bearing upon this question.

It is stated, in the argument of the learned counsel, that 'this is a suit instituted on the instance side of the admiralty for an alleged marine trespass,' and also, 'that it is not a suit for damages.' I would ask what is a decree of restitution in value, but a decree of damages for a marine trespass? And is the respondent, merely because the proceedings are instituted on the | instance side of the admiralty, to be p. 507
ousted of his defence, and not to be permitted to show that no trespass was committed.

What is a tort of which a court of admiralty has jurisdiction? Vide Conkling's United States Admiralty, p. 21, where Judge Story enumerates the different injuries redressed by a court of admiralty. See also, p. 334, 336, note a. The passages referred to describe the various injuries for which legal redress can be obtained, and point out the particular remedies; and yet there is nothing like a claim for damages because the property was not condemned, but they refer to the legality or illegality of the seizure; and in the last reference it is said, 'if no proceeding is instituted, as is sometimes the case when the captor himself has become convinced of the invalidity of the capture, or the captured property has been lost by recapture or otherwise, the injured party may, in such case, himself become the primary actor, by calling on the captor to proceed to adjudication, and at the same time invoking the justice of the court to award damages, if the capture shall be adjudged to have been tortious;' not because the captor had not proceeded to adjudication.

In Wheaton on Captures, p. 280, sect. 18, the same redress is pointed out. 'If the captors omit or delay to proceed to the adjudication of the property, any person claiming an interest in the captured property may maintain a monition against them, citing them to proceed to adjudication, which, if they do not do, or show cause why the property should be condemned, it will be restored to the claimants proving an interest therein; and this process is often resorted to when the property is lost or destroyed through the fault or negligence of the captors, in order to obtain a compensation in damages for the unjust seizure and detention.'

In 2 Wheaton's Rep. App. p. 11, it is said, 'If the captors unjustifiably neglect to proceed to adjudication, the court will, in case of restitution, decree demurrage against them,' and cites the Madonna del Burso, 4 Rob. 169; The Corier Maratimo, 1 Rob. 287; The Peacock, 4 Rob. 185; The Anna Catherina, 6 Rob. 10.

Hence, whenever a restitution in value is decreed, it is upon the ground that there would have been a restitution of the property valued, and no case cited by the learned counsel controverts this position.

(The counsel then proceeded to comment upon the following cases: The Lucy, 3 Rob. 208; The Huldah, 3 Rob. 235; The Madonna del Burso, 4 Rob. 169; The St. Juan Baptista, 5 Rob. 33; The Wilhelmsberg, 5 Rob. 143; The Lively, 1 Gallison, 315; The Felicity, 2 Dodson, 381; The Rover, 2 Gallison, 239.)

Various acts of Congress have been referred to to show that it is the
p. 508 duty of a captor to bring in captured property, and proceed | to adjudication. This general principle, it has been before stated, is admitted. It is not contended, in behalf of respondent, that a captor may, at his pleasure, under any circumstances, disregard the injunctions of the law, omit to bring his prize into court, convert it into money, and retain it in his own hands. The maintenance of such principles is not necessary to his defence in this suit.

But I would ask, is a veil to be thrown over the conduct of the libellants, or their agents? Is the fact to be kept out of view, that the master of the Admittance sailed from New Orleans with the intent to trade with the enemy, and did in fact trade with the enemy? Will this court aid an unworthy claimant? 'It is a good moral and legal principle, that a man must come into a court of justice with clean hands, and that the law will not lend its aid to a person setting up a violation of law on the face of his claim.' Wheaton on Captures, 225.

The Anna Maria, 2 Wheaton, 328. Chief Justice Marshall says: 'To sustain the claim of the libellants, the first point to be established is the fairness of the voyage.'

The Gran Para, 7 Wheaton, 483. 'A claim founded on piracy, or any other act, which, in the general estimation of mankind, is held to

be illegal or immoral, might, I presume, be rejected in any court on that ground alone.' And is not the present claim founded on an illegal act? The demurrer admits the illegal act, and yet the claim is for restitution.

The Bello Corrunes, 6 Wheaton, 169. 'But can a citizen of this country, who has violated its laws, ever be recognized in our courts as a legal claimant of the fruits of his own wrong?'

It will be perceived, by referring to the answer of the respondent, and the amendment to the answer, that the seizure may be justified on two grounds: first, a trading with the enemy; and, second, that it was the property of the enemy. The Rugen, 1 Wheaton, 74. It is important, in the view now about to be taken, to ascertain the national character of the libellants. The libel states they were neutrals, some of them subjects of the Queen of Spain, and the others subjects of France. This is denied by the answer, which avers that they were resident merchants of Mexico, conducting there a commercial establishment—a fact beyond dispute. 'If a person has a residence in a hostile country, and conducts a commercial establishment there, notwithstanding his place of birth, he will be considered as an enemy in regard to his commercial operations.' 1 Kent, 74, 75.

Then the libellants must be considered as belligerents, and this must be taken as admitted by the demurrer.

Was condemnation necessary to divest the libellants of the property? |

In Gelston *v.* Hoyt, 3 Wheaton, it was decided that a forfeiture p. 509
attached *in rem* at the moment the offence was committed, and the property was instantly divested, so that no action could be maintained for the subsequent seizure. This, it is said, was a case of a statute forfeiture, and has no analogy to the question under consideration; but it is submitted that it has an important bearing, inasmuch as it shows that whatever may be the subsequent conduct of a captor, an action cannot be maintained against him.

The Mars, 1 Gallison, 192.[1] In this case it will be found, that upon principles of common law the following propositions were discussed by Judge Story:

1. What is the interest or right which attaches to the government in forfeitures of property, before any act done to vindicate its claims?

2. What is the operation of such act, done to vindicate its claim, as to the offender and as to strangers?

And the conclusions he arrived at were—

1st. 'That an absolute property vested in the United States when actual seizure was made.'

[1] This case more particularly applies to the first ground of seizure,—'trading with the enemy.'

2d. ' That, as against the offender or his representatives, upon seizure, the title, by operation of law, relates back to the time of the offence, so as to avoid all mesne acts.'

Then, upon the authority of this case, it is submitted, that the libellants were absolutely divested of their property upon the commission of the offence. A captor may destroy property. 1 Kent, 104. ' Sometimes circumstances will not permit property captured at sea to be sent into port, and the captors in such cases may either destroy it, or permit the original owner to ransom it.'

There are decisions to the effect that it requires a sentence of condemnation to change the property, but this applies to a neutral purchaser as in the case of the Flad Oyen, (1 Rob. 117,) the substance of which decision was, that the owner could have restitution of his property from a neutral vendee, unless it had been condemned to the captors; and the reason of this is obvious, the neutral purchaser can only take that which his condition of neutrality permits him to take, and when he takes the property without condemnation from the captors, he occupies the position of a captor, which is inconsistent with his neutrality.

In Goss *v.* Withers, (2 Burr. 694,) Lord Mansfield says, ' the property
p. 510 is not changed so as to bar the owner, in favor of a | vendee, or recaptor, till there has been a sentence of condemnation,' intimating that it is changed without condemnation so as to bar the owner in a claim against the captor.

In 1 Kent, 101, it is said: ' When a prize is taken at sea, it must be brought with due care into some convenient port for adjudication by a competent court; though, strictly speaking, as between the belligerent parties, the title passes and is vested when the capture is complete; and ' this question never arises but between the original owner and a neutral purchasing from the captor, and between the original owner and a re-captor.'

The Adventure, 8 Cranch, 226. The Adventure was an English ship, seized by the French. The French captors made a donation of her to the crew of an American brig, who brought her into Norfolk, and claimed her as their property, acquired by the donation of the captors. Mr. Justice Johnson, in delivering the opinion of this court, says: ' As between the belligerents, the capture undoubtedly produces a complete divestiture of property.'

Admitting the principle supposed to be decided in the case of Price *v.* Noble, (4 Taunt. 123,) to be correct, that the property was not changed, because there was a *spes recuperandi*, it would not affect this case, the property having been brought *infra presidia;* and this may be also observed of the reference to 15 Vin. Abr. 51.

In the case of Camden *v.* Home, (6 Bro. P. C., 2 H. B.) the statute expressly vested the right in the captor after adjudication.

On these grounds it is submitted that condemnation was not necessary to divest the libellants of their property.

It is urged, in behalf of the libellants, that the government has asserted and can assert no rights here; and if the defence is held available, it will place the 'whole proceeds of this valuable cargo in the pocket of the respondent.' What will or will not go into the pocket of the respondent, is a question not pertinent to the issues represented by the record; but, it may be observed, that one half of the property in question, if lawful prize, belongs to the government; and upon the institution of this suit it asserted its rights so far as to employ counsel for the respondent.

By directions from the Navy Department, the proceeds of the sale of the ship and cargo were not distributed, but were sent into the United States, and placed in the treasury, where they now are, a circumstance which, it is believed, was known to the libellants; and if they had thought proper to institute proceedings calling on the respondent to bring in the proceeds, they would have been forthcoming. The property has not been | 'illegally or unjustifiably' converted, and, under the p. 511
authority of the case of the Eole, (6 Rob. 224,) the proceeds are entitled to the privilege of prize property, and subject to the judgment of the court.

There is not a single circumstance, connected with this seizure, which can justify the imputation of misconduct. For reasons, which were conclusive in the mind of the respondent, he directed an officer to board and seize the Admittance. Upon the examination of her papers, it was at once seen that his reasons were well founded. The deceptive clearance, the erasures upon the bills of lading, the false entries in the log-book, the position of the ship on the coast of Mexico when she had cleared for Honolulu, were all circumstances indicating guilt. The subsequent testimony of the mate of the Admittance, that she had been sailing under false colors, answering private signals given from various points on the shore, receiving and answering written communications, her name on the stern concealed with canvas, the captain expressly avowing his intention of discharging his cargo at some port or place in possession of the enemy, and expressing a fear of falling in with an American man-of-war, affords the most conclusive evidence, that to have acted otherwise, the respondent would have been justly chargeable with a violation of his duty.

The condition of the ship, the want of stores, and his inability to furnish a prize crew, rendered it impossible to send her into any port of the United States, a state of things which had been contemplated by the instructions he received from his superior in command. He, therefore, proceeded to Monterey, and libelled the ship in the afore-

mentioned court, which he had every reason to believe was a competent tribunal. The papers of the Admittance were there filed, and finally transmitted to the Navy Department, copies of which have been furnished the counsel of the libellants, and they are referred to and made a part of the respondent's answer.

There are two grounds, either of which, if it is competent for this court to consider, as the case is presented, must be conclusive against the libellants.

1st. What authority have the libellants to appear and claim an interest in the cargo? They were belligerents. The libel states that the cargo 'was purchased by order of Messrs. Rubio, Brothers & Co., subjects of the Queen of Spain; the bills of lading were made out in their name, and were subsequently indorsed and transferred to the libellants;' that 'the cargo was shipped at New Orleans in October, 1846.' The answer avers that Messrs. Rubio, Brothers & Co. were also belligerents, a fact which cannot be denied. Then, how could they
p. 512 acquire property | by a purchase at New Orleans during the war? Was a right of property ever vested in either Rubio, Brothers & Co. or the libellants? Vide 1 Kent, 67, and the authorities there cited.

2d. Does not the intervention of peace bar the claimants? 'Captured property remains in the same condition in which the treaty finds it, and it is tacitly conceded to the possessor. The intervention of peace cures all defects of title.' 1 Kent, ch. 5, 111; ch. 8, 169.

The schooner Sophie, 6 Rob. 138. Sir William Scott says, 'I am of opinion that the title of the former owner is completely barred by the intervention of peace, which has the effect of quieting all titles of possession arising from the war,' and this was decided in a cause where the captured vessel claimed had not been condemned.

Upon these views, the respondent prays that so much of the judgment of the Circuit Court as sustains the first demurrer may be reversed, and that the residue of said judgment may be affirmed with costs.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case arises upon the capture of the ship Admittance during the late war with Mexico, by the United States sloop of war Portsmouth, commanded by Captain Montgomery.

The Admittance was an American vessel, and after war was declared, sailed from New Orleans with a valuable cargo, shipped at that place. She cleared out for Honolulu, in the Sandwich Islands; and was found by the Portsmouth at Saint Jose, on the coast of California, trading, as it is alleged, with the enemy.

Before this capture was made, a prize court had been established at Monterey, in California, by the military officer, exercising the functions

of governor of that province, which had been taken possession of by the American forces. A chaplain, belonging to one of the ships of war on that station, was appointed Alcalde of Monterey, and authorized to exercise admiralty jurisdiction in cases of capture. The court was established at the request of Commodore Biddle, the naval commander on that station, and sanctioned by the President of the United States, upon the ground that prize crews could not be spared from the squadron to bring captured vessels into a port of the United States. And the officers of the squadron were ordered to carry their prizes to Monterey, and libel them for condemnation in the court above mentioned, instead of sending them to the United States.

In pursuance of this order the Admittance was carried to Monterey, and condemned by the court as lawful prize ; and the vessel and cargo sold under this sentence. The seizure at Saint | Jose was made on the 7th p. 513
of April, 1847, and the ship and cargo condemned on the 1st of June, in the same year.

The order of the President, authorizing the establishment of the court, required that the proceeds, arising from the sale of prizes, should not be distributed, until a copy of the record was sent to the Navy Department, and orders in relation to the prize-money received from the secretary. No order appears to have been given in this case, and it would be presumed, from the pleadings, that it is still in the custody of the commander of the Portsmouth. It has, however, been stated in the argument, and we understand is admitted, that the money was sent to the United States, and placed in the custody of the Treasury Department, where it still remains. But it is not material in this case to inquire, whether it is still in possession of Captain Montgomery, or in the custody of the Secretary of the Treasury. It could not, in either case, affect the decision. This is the case as it appears on the record, and admissions in the argument. It comes before the court on the following pleadings.

The claimants, on the 6th of June, 1848, filed a libel in the Admiralty Court for the District of Columbia, against the captor, stating that they were the owners of the cargo of the Admittance ; that they were subjects of Spain, and neutrals in the war between this country and Mexico ; that the Admittance sailed on a lawful voyage ; that the vessel and cargo were seized at Saint Jose by Captain Montgomery as prize of war, without any lawful or probable cause ; that the vessel and cargo were not brought to the United States, nor proceeded against as prize of war in any court having jurisdiction to adjudicate upon the lawfulness of the capture, but were unlawfully sold and disposed of by Captain Montgomery, who thereby had put it out of his power to proceed to any lawful adjudication upon the legality of the capture, and had thus made himself a trespasser *ab initio*, independently of any lawful or probable

cause for the original seizure. They pray, therefore, that he may be compelled to bring the cargo within the jurisdiction of the court, or of some other court of the United States, and institute proceedings against the property, and show that there was lawful or probable cause for the seizure, and have the same adjudicated upon by some court of the United States having full jurisdiction in the matter; and that restitution of the goods or the value thereof may be awarded to the libellants, with damages for the unlawful seizure.

Captain Montgomery appeared and answered, and admitted that, as commander of the United States ship Portsmouth, he seized and took the Admittance at Saint Jose as lawful prize; and justifies the seizure
p. 514 upon the ground that she sailed from | New Orleans with the design of trading with the enemy; that she did in fact hold illegal intercourse with them, and discharged a part of her cargo at Saint Jose. And the respondent exhibits with his answer, and as a part of it, sundry papers received from Peter Peterson, the master of the Admittance, together with her log-book and the deposition of her mate.

The respondent further states that it was impossible for him, consistently with the public interests, to send the Admittance to any port of the United States; and that he carried her before the prize court hereinbefore mentioned, at Monterey, where she was condemned with her cargo as lawful prize; and exhibits the proceedings of that court as a part of his answer, and relies on this condemnation as a bar to the present proceedings on behalf of the claimants.

To this answer the libellants put in two demurrers.

1. To so much of the answer as relies upon the condemnation at Monterey as a bar.

2. To so much of the answer as relies upon the acts of the captain and crew of the Admittance as a justification for the seizure of the ship or cargo as lawful prize of war, or furnishing probable cause for seizure; and, as the ground for this demurrer, avers that the Admiralty Court for the District of Columbia had no jurisdiction to adjudicate upon the question of prizes or probable cause of seizure, as the property was not within its control, and could not be brought within it in consequence of the sale in California. The respondent joined in these demurrers.

After these issues in law had been joined, the respondent, by leave of the court, amended his answer, averring in the amendment that the libellants, at the time of the shipment at New Orleans and at the time of the seizure, were domiciled in Mexico and conducting a commercial establishment in that country; and also, that the libellants were the owners of only a small portion of the cargo. But there is no replication to this amendment, nor is it embraced in the issues of law made by the demurrers. The omission to dispose of it, however, forms no objection

to this appeal, as the judgment of the Circuit Court was final, and disposed of the whole case, independently of these new allegations.

In this state of the pleadings, a decree was entered in the District Court sustaining both of the demurrers, and directing the respondent to bring the cargo within the jurisdiction of some District Court of the United States, and institute proceedings against it as prize of war, on or before the day mentioned in the decree; and that in default thereof the libellants should recover its value.

This decree was entered *pro formâ* in order to bring the case | before p. 515
the Circuit Court, to which the respondent accordingly appealed. And upon the argument in the last-mentioned court, the first demurrer was sustained, and the decree of the District Court in that respect affirmed; but so much of the decree as sustained the demurrer to the answer of the respondent, averring sufficient probable cause for the seizure of the cargo, was reversed, and a final decree upon that ground rendered against the libellants.

From this decree both parties have appealed to this court.

In relation to the proceedings in the court at Monterey, which is the subject of the first demurrer, the decision of the Circuit Court is correct.

All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States. And neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party.

The second demurrer denies the authority of the District Court to adjudicate, because the property had not been brought within its jurisdiction. But that proposition cannot be maintained; and a prize court, when a proper case is made for its interposition, will proceed to adjudicate and condemn the captured property or award restitution, although it is not actually in the control of the court. It may always proceed *in rem* whenever the prize or proceeds of the prize can be traced to the hands of any person whatever. |

p. 516 As a general rule, it is the duty of the captor to bring it within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned. This is required by the act of Congress in cases of capture by ships of war of the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which in all civilized countries secures to the captured a trial in a court of competent jurisdiction before he can finally be deprived of his property.

But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel; or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign county; and may afterwards proceed to adjudication in a court of the United States. 4 Cr. 293; 7 Id. 423; 2 Gall. 368; 2 Wheat. App. 11, 16; 1 Kent's Com. 359; 6 Rob. 138, 194, 229, 257.

But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture, and award restitution and damages against the captor, although the seizure as prize was originally lawful, or made upon probable cause.

And the same rule prevails where the sale was justifiable, and the captor has delayed, for an unreasonable time, to institute proceedings to condemn it. Upon a libel filed by the captured, as for a marine trespass, the court will refuse to award a monition to proceed to adjudication on a question of prize or no prize, but will treat the captor as a wrongdoer from the beginning.

But, in the case before us, sufficient cause for capture and condemnation is stated in the answer; and the reason assigned therein is a full justification for not sending the Admittance and her cargo to the United States. And as to the delay, he had reasonable ground for believing that no further proceedings were necessary after the condemnation at Monterey. The court had been constituted with the sanction of the

executive department of the government, under whose orders he was acting; and it had condemned the vessel and cargo as prize, and ordered them to be sold. And if, as seems to be conceded in the argument, the proceeds were paid over to the government to await its further orders, and still remain in its hands, certainly no laches or neglect of duty in any respect can be imputed to the respondent.

Inasmuch, therefore, as the answer alleges a sufficient cause for p. 517
selling the property before condemnation, and also for not proceeding against it in a court of competent jurisdiction, the respondent has forfeited none of the rights which he acquired by the capture. And, as the District Court had jurisdiction, the second demurrer ought to have been overruled, and an order passed directing Captain Montgomery to institute proceedings by a certain day to condemn the property, (giving him reasonable time,) and that, upon his failure to comply with the order, the court should proceed on the libel filed against him for a marine trespass, and award such damages as the libellants might show themselves entitled to demand.

The necessity of proceeding to condemnation as prize, does not arise from any distinction between the Instance Court of Admiralty and the Prize Court. In England, they are different courts; and, although the jurisdiction of each of them is always exercised by the same person, yet he holds the offices by different commissions. But, under the Constitution of the United States, the Instance Court of Admiralty and the Prize Court of Admiralty are the same court, acting under one commission. Still, however, the property cannot be condemned as prize, upon this libel; nor would its dismissal be equivalent to a condemnation, nor recognized as such in foreign courts. The libellants allege that the goods were neutral, and not liable to capture; and their right to them cannot be divested until there is a sentence of condemnation against them as prize of war. And, as that sentence cannot be pronounced in the present form of the proceeding, it becomes necessary to proceed in the prize jurisdiction of the court, where the property may be condemned or acquitted by the sentence of the court, and the whole controversy be finally settled. 4 Cr. 241; Rose *v.* Himely; 2 Wheat. App. 41, 42; 1 Kent's Com. 101, 102; 6 Rob. 48; 3 Id. 192; 2 Gall. 368; 2 Id. 240.

But the Circuit Court erred in giving final judgment against the libellants, upon the ground that the answer showed probable grounds for the seizure. The question of probable cause is not presented in the present stage of the proceedings, and cannot arise until the validity of the capture is determined. If it turn out, upon the final hearing upon the question of prize or no prize, that the vessel and cargo were liable to capture and condemnation, it would necessarily follow that there was not only probable cause, but good and sufficient cause, for the

seizure. And if, on the contrary, it should be found that they were not liable to capture, as prize of war, the libellants would be entitled to restitution, or the value in damages, although the strongest probabilities appeared against them at the time of the seizure. Probable cause or not
p. 518 becomes material only where restitution is awarded, and | the libellants claim additional damages, for the injury and expenses sustained from the seizure and detention. It applies only to these additional damages; and, however strong the grounds of suspicion may have been, it is no bar to restitution, if the claimant can show that the goods which he claims belonged to him, were neutral, and that nothing had been done that subjected them to capture and condemnation.

The judgment of the Circuit Court must therefore be reversed, and a mandate awarded, directing the case to be remanded to the District Court, to be there proceeded in, according to the rules and principles stated in this opinion.

The appeal on the part of the respondent is dismissed. The decision upon the matter in controversy was in his favor, and the question of law decided against him on the first demurrer, was open for argument upon the appeal of the libellants. There was no ground, therefore, for this appeal.

Order in Jecker et al. v. *Montgomery.*

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein, in conformity to the opinion of this court.

Order in Montgomery v. *Jecker et al.*

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged, and decreed, by this court, that this cause be, and the same is hereby, dismissed, with costs.

Jecker, Torre, and Co., et al., Claimants of the Cargo of the Ship Admittance, and Fessenden and Fay, Claimants of the Ship Admittance, v. John B. Montgomery, Libellant.

(18 Howard, 110) 1855.

In a state of war, the nations who are engaged in it, and all their citizens or subjects, are enemies to each other. Hence, all intercourse or communication between them is unlawful.

Cases mentioned, by way of illustration, in which property of a subject or citizen, found trading with an enemy, has been adjudged to be forfeited as prize.

The interposition of a neutral port through which the property is to pass, does not prevent it from being confiscated.

In the present case, the evidence shows that the owners of the ship and cargo knew that the destination of the voyage was to an enemy's port. Even if the owner of the | vessel was ignorant of it, the fate of the vessel must be decided by the p. 111
acts of those persons who had her in charge.

It is generally the duty of the captor to send his prize home for adjudication; but circumstances may render such a step improper, and of these he must be the judge. In making up his decision, good faith and reasonable discretion are required. In the present case he was excusable for not sending home the vessel.

Generally, the proceedings for the condemnation of property as prize, ought to be instituted in the name of the United States. That circumstances, which led to the use of the name of the captor, and the fact that no objection was made to it in the court below, prevent this court from pronouncing the objection to be fatal.

The proceeds of sale were properly deposited in the treasury of the United States.

THIS was an appeal from the circuit court of the United States for the District of Columbia, holden in and for the county of Washington.

The case is stated in the opinion of the court.

It was argued by *Mr. Coxe* and *Mr. Nelson*, for the appellants, and *Mr. Key* and *Mr. Johnson*, for the appellees. The arguments consisted chiefly in comments upon the evidence upon both sides, and, for the appellants, in the legal objection that the libel should have been filed in the name of the United States, instead of an individual.

Mr. Justice DANIEL delivered the opinion of the court.

This is an appeal from a decree in admiralty by the circuit court of the United States for the District of Columbia, by which decree the ship Admittance, claimed by the appellants, Charles B. Fessenden and Richard S. Fay, as owners, and the cargo of the same ship claimed by the appellants, Jecker, Torre and Co. and Manual Quintana, were upon a libel filed by the appellee, John B. Montgomery, condemned as prize of war.

It will serve to explain the nature of the present controversy, and the character of the decree of the circuit court above mentioned, to refer to the proceedings heretofore had therein upon a libel filed by the claim-

ants of the cargo for restitution, and to the decision of this court upon cross-appeals from those proceedings, both by the claimants and the captor, out of which last-mentioned decision the case before us has arisen.

By the decision of this court just referred to, (see 13 Howard, p. 498,) we hold the following propositions to have been expressly ruled :—

1. That the admiralty court of the District of Columbia had jurisdiction of the libel for the condemnation of the property in contest, although such property was not brought within its jurisdiction ; and if they found the subject liable to condemnation, might proceed to condemn, although not in fact within the custody or control of the court.

2. That the admiralty court in the District of Columbia, having
p. 112 jurisdiction of the case, it was its duty to order the captors | to institute proceedings in that court to condemn the property as prize, by a day to be named in the order ; and in default thereof to be proceeded against upon a libel for an unlawful seizure ; because the property of the claimant is not devested by the capture, but by condemnation in a prize court—is not devested until condemnation, though such condemnation will relate back to the capture.

3. That the grounds alleged for the seizure of the vessel and cargo, namely, that the vessel sailed from New Orleans with the design of trading with the enemy, and did in fact hold illegal intercourse with them, are sufficient, if supported by testimony, to subject both vessel and cargo to condemnation.

4. And if they were liable to condemnation, the reasons assigned in the answer for not bringing the vessel and cargo into a port of the United States for trial—namely : that it was impossible so to do consistently with the public interest—is sufficient, if supported by proofs, to justify the captors in selling vessel and cargo in California, and to exempt the captors from damages on that account.

5. That to a libel for restitution, probable cause for seizure is no defence ; but is so only against a claim for damages, in cases in which the property has been restored or lost after seizure.

Under the authority of the rulings just enumerated, and in obedience to the mandate founded thereupon, the libel in the cause now before us was filed ; and the case made by the parties presents, as the material questions for consideration, the inquiries ; 1. Whether the vessel sailed with the design of trading with the enemy, and did in fact hold illegal intercourse with them. 2. Admitting that the vessel and cargo were in the first instance liable to condemnation, whether the reasons assigned for not bringing them within the United States were so supported by proof, as to justify the captor in not bringing them within the United

States, and in selling them in California, without a forfeiture of their rights as captors.

As a principle applicable to the first of these inquiries, it may be averred as a part of the law of nations—forming a part, too, of the municipal jurisprudence of every country—' that in a state of war between two nations, declared by the authority in whom the municipal constitution vests the power of making war, the two nations and all their citizens or subjects are enemies to each other.' The consequence of this state of hostility is, that all intercourse and communication between them is unlawful. *Vide* Wheaton on Maritime Captures, cap. 7, p. 209, quoting from Bynkershoeck this passage: '*Ex natura belli commercia inter hostes cessare, non est dubitandum. Quamvis nulla specialis* | *sit commerciorum prohibitio, ipso tamen jure belli, commercia inter hostes esse vetita, ipsæ indictiones bellorum satis declarant.*' p. 113

Upon this principle of public law, it has been the established rule of the high court of admiralty in England, that a trading with the enemy, except by a royal license, subjects the property to confiscation. The decisions of that court show that the rule has been rigidly enforced, as, for instance, where the government had authorized a homeward trade from the enemy's possessions, but had not specifically protected an outward trade to the same; and again, in instances where cargoes have been laden before the war, but where the parties had not used all possible diligence to countermand the voyage after the first notice of hostilities; and this rule has been enforced, not only against subjects of the Crown, but likewise against those of its allies in the war, upon the assumption that the rule was founded on the universal principle which states allied in war had a right to apply to each other's subjects. *Vide* Wheaton on Captures, p. 212; and 1 C. Robinson's Adm. R. 196, The Hoop.

The same rule has been adopted with equal strictness by this court. In the case of The Rapid, reported in 8 Cranch, 155, the claimant, a citizen of the United States, had purchased goods in the enemy's country a long time before the declaration of war, and had deposited them on an island near the boundary line between the two countries. Upon the breaking out of hostilities, his agents had hired the vessel to proceed to the place of deposit and bring away these goods. Upon her return the vessel was captured, and, with the cargo, was condemned as prize of war for trading with the enemy. In applying the law to this state of facts, this court said, and said unanimously; ' That the universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the

enemy of his country. But, after deciding what is the duty of the citizen, the question occurs, what is the consequence of a breach of that duty? The law of prize is a part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it. Condemnation to the use of the captor is equally the fate of the property of the belligerent and of the property engaged in anti-neutral trade. But a citizen or an ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks.' Again, the court say: 'If by trading, in
p. 114 prize law was meant that signification | of the term which consists in negotiation or contract, this case would not come under the penalties of the rule. But the object and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent nations. Negotiation or contract, has, therefore, no necessary connection with the offence. Intercourse inconsistent with actual hostility is the offence against which the operation of the rule is directed.'

The case of The Joseph, reported in 8 Cranch, p. 451, was that of a vessel owned by citizens of the United States, that sailed from thence before the war, with a cargo on freight on a voyage to Liverpool and the north of Europe, and thence back to the United States. After arriving and discharging her cargo at Liverpool, she took in another at Hull, and sailed for St. Petersburg. At St. Petersburg, she received news of the war with England, and sailed to London with a Russian cargo consigned to British merchants; delivered her cargo and sailed for the United States in ballast, under a British license, and was captured. In the opinion of this court in this case, delivered by Washington, Justice, it is said: 'That after the decision in the cases of The Rapid and of The Alexander, it is not to be contended, that the sailing with a cargo on freight from St. Petersburg to London, after a full knowledge of the war, did not amount to such a trading with the enemy as to have subjected both the vessel and cargo to condemnation as prize of war, had she been captured on that voyage. The alleged necessity of undertaking that voyage to enable the master out of the freight to discharge his expenses at St. Petersburg—countenanced, as the master declares, by the opinion of our minister at St. Petersburg, that by undertaking such a voyage he would violate no law of the United States—although these considerations, if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this court to admit as the basis of its decision.'

The same course of decision which has established that property of a subject or citizen taken trading with the enemy is forfeited, has decided also that it is forfeited as prize. The ground of the forfeiture, is, that it is taken adhering to the enemy, and therefore the proprietor is *pro*

hac vice to be considered as an enemy. *Vide* also Wheaton on Captures, p. 219, and 1 C. Robinson, 219, the case of The Nelly.

Attempts have been made to evade the rule of public law, by the interposition of a neutral port between the shipment from the belligerent port and their ultimate destination in the enemy's country; but in all such cases the goods have been condemned, as having been taken in a course of commerce rendering them | liable to confiscation; and it has p. 115
been ruled that, without license from government, no communication, direct or indirect, can be carried on with the enemy; that the interposition of a prior port makes no difference; that all trade with the enemy is illegal, and the circumstance that the goods are to go first to a neutral port will not make it lawful. 3 C. Robinson, 22, The Indian Chief; and 4 C. Robinson, 79, The Jonge Pieter.

Having thus stated the law with regard to maritime captures, it remains to be ascertained how far the case before us upon the pleadings and proofs, falls within the scope or the terms of that law.

The libel propounds, that the libellant, as the commander of the United States ship Portsmouth, did, on the 7th of April, 1847, at the port of San José in lower California, in the Republic of Mexico, seize and take possession of as lawful prize, a certain ship or vessel called The Admittance—one Peter Peterson being the master—with her cargo, provisions, tackle, and all other appurtenances to the said ship belonging. That the said ship is a merchant vessel belonging to citizens of the United States, and that the cargo of said ship is believed by the libellant to have belonged to certain merchants resident in Mexico. That about the month of October, 1846, the said ship with her cargo, left the port of New Orleans for a port in the Republic of Mexico, into which port the captain intended to discharge the cargo. That for some time prior to the sailing of this ship, and upon the day of her seizure, open and public war existed between the United States and the Republic of Mexico and its dependencies. That in consequence of said state of war, and in discharge of his duty, the ship Admittance, with her cargo, was seized by the libellant as prize of war.

The libellant further propounds, that Peterson, as master of the said ship, did sail from the United States with the intention of trading, and in fact did trade and otherwise hold illegal intercourse with the enemies of the United States, whereby the said ship, her cargo, tackle, and appurtenances, became subjects of lawful prize. All which illegal intention and acts of the master more fully appear by the papers of the said ship, and by other papers received from the master by the libellant, numbered from one to fifteen inclusive; from the deposition of William Bell, the first mate of The Admittance, and from the log-book—all of which it is prayed may be made parts of the libel; which concludes

with a prayer for condemnation of ship and cargo, and for the dismission of the libel previously filed by Torre, Jecker, and Co., praying restitution of a portion of the cargo.

p. 116 To the libel of Captain Montgomery were filed an answer on | behalf of Fessenden and Fay, who intervened as owners of the ship, and separate answers on behalf of Jecker, Torre, and Co., and of Manuel Quintana, as owners of the cargo.

These answers, so far as they are made up merely of general denials of the charges propounded in the libel, require no special animadversion. So far, however, as the specific facts alleged in them by way of exculpation, the compatibility of those facts with the established law of prize, or with the proofs adduced in the case, become a question, the statements in these answers are matters of essential importance, requiring particular examination.

The respondents Fessenden and Fay, have in their answers observed an entire silence with respect to a knowledge on their part as to the destination of the ship or cargo; whilst they are very explicit in the assertion of their belief, that the cargo was put on board by the charterer, and that the ship sailed under a full persuasion that a treaty of peace would speedily terminate the then existing war between the United States and Mexico, and that they never were informed, nor do they believe, that the cargo was to be landed or disposed of in Mexico until after the termination of the war. Personally they say, that they know nothing of what occurred in relation to the ship and cargo in the Pacific; but from what they have learned they believe, and therefore aver, that there was no trading with the enemy at any time during the voyage. This statement which implies knowledge in the respondents of the existence of war between the United States and Mexico at the time of chartering of their ship, and knowledge likewise that the cargo put on board was destined for the port of a nation, at the time of the shipment at any rate, in open hostility with the United States, will, as to its verity, be further tested by a comparison with the testimony furnished by the papers found in the captured vessel and by the examination of witnesses. And in this connection it may be observed, that the bare permission by the owners of the use of their vessel in hostile or piratical enterprises, renders such vessel liable to capture and condemnation equally with her employment in similar offences under the immediate command of such owners themselves. *Vide* the case of The United States *v.* The Brig Maleck Adel, 2 How. 234; The United States *v.* The Schooner Little Charles, 1 Brok. Rep. 347; The Palmyra, 12 Wheat. 14; 1 C. Rob. R. 127; The Vrow Judith.

Comparing this answer with the papers found on board the captured vessel, we see it expressly stipulated in the charter-party, the very

contract by which the ship was hired, and which was signed by these respondents, that the ship shall proceed to New Orleans, and there take from the charterers Wylie and Ygana, 1,100 bales of cotton, to be p. 117 delivered at the port of San Blas to the order of the shipper, the consignee paying freight for the room occupied in the ship by the cotton, eleven hundred dollars, payable on delivery of the cargo ; the cargo to be received at New Orleans and discharged at San Blas with dispatch. The charter-party further provides, that if on the arrival of the ship off San Blas, the port is blockaded, or other obstructions prevent the discharge of the ship, she shall proceed to the Sandwich Islands, and there remain until the port is open, the said Wylie and Ygana paying in addition to the charter the further sum of one thousand dollars per month during such detention. We will hereafter state what is conceived by this court to be the proper construction of this phrase, ' if the port is blockaded, or other obstructions prevent the discharge of the ship.' Independently of this phrase, however, we have, on the face of this contract, the declaration that the shipment was made to an enemy's port ; that the delivery was to take place at that port ; that the interposition of the neutral island of Honolulu was not for the purpose of trade with, or transshipment at that island, but solely for the purpose of affording an opportunity to enter into and discharge at a port known to be an enemy's port, in which the consignees of the cargo resided, and the delivery at which port was made a precedent and necessary condition to the payment of freight.

Upon a comparison of the bill of lading with the charter-party, the *terminus* of the voyage and the destination of the cargo are more clearly shown. The language of the bill of lading runs thus : ' Shipped in good order and well conditioned, by Wylie and Ygana, on board the good ship Admittance, whereof is master for the present voyage Peterson, and now lying at New Orleans, and bound for Honolulu, two thousand seven hundred and seven small bales of cotton, being marked and numbered as in the margin, and are to be delivered.' Where ? Not at Honolulu, where there was no consignee, apparent or mentioned—not at San Blas, as an incidental point in the track of the voyage to Honolulu, but at ' the aforesaid port of San Blas,' the predetermined limit of the voyage, and to Don Lewis Rivas Gongora, resident at San Blas, the correspondent and consignee of the shipper.

Taking, in connection with the charter-party and the bill of lading, the instructions from the respondent, Fessenden, to the master of the ship before sailing from New Orleans, it seems almost incredible that the owners should have been ignorant of the character of the voyage, and of the hazards incurred by their vessel resulting from that character. How, upon any other view, can be accounted for the extreme caution

p. 118 enjoined upon the | master with respect to the danger of entering a Mexican port—danger expressly distinguished from that arising from the probability of capture by vessels of the United States ; such as it is said might arise from the disposition of the Mexican government, under the plea of the right of war to confiscate the vessel, notwithstanding the consignees might have obtained permission to land the cargo ? It is absurd to suppose that this caution could have had any possible reference to a state of reëstablished amity between Mexico and the United States, as the vessel of a friendly nation could incur no risk of confiscation by entering the port of a friend. We think that it was to dangers and hazards which might proceed from the Mexican authorities—hazards and dangers incident to an existing and known state of war, which were in the contemplation of the owners when, in the charter-party, they speak of ' other obstructions,' (beyond that of blockades,) ' which might prevent the discharge of the ship at San Blas,' an enemy's port. This interpretation of the conduct and purposes of the owners and charterers is strongly corroborated by, and explains that portion of the instructions to the master which tells him, ' you will perceive from this that you must be very cautious about going into a Mexican port, for, although the consignees may have authority to land the cotton, yet they might seize the vessel after being discharged, unless the vessel as well as the cargo had permission from the Mexican government.' This language would be unintelligible, unless it had reference to a known belligerent attitude of the two nations, forbidding intercourse or traffic between their respective citizens, and to a contemplated dispensation from the existing prohibitions by one of the belligerents. We are, therefore, upon a just construction of the answer of the claimants of the vessel, of the charter-party signed by them, of the bill of lading, and of the instructions to the master, impelled to the conclusion, that these claimants of the vessel were aware of the character of the voyage for which they had hired her, and were willing, nevertheless, to incur the hazards of the enterprise in consideration of the profits it promised them.

Looking next beyond the evidence of intention and knowledge as deducible from the ship's papers proper, to the acts of the master in execution of the objects and purposes of the voyage, the following facts are shown by the testimony of the witnesses, Bell, Martin, and Graves, all of them belonging to the crew of The Admittance, and the first-named being the mate of the ship : That she sailed directly to San Blas ; that upon her arrival off this port, then being an enemy's port, and in the possession of the enemy, she remained before it three days and nights, during which time the master opened an intercourse with the port, | p. 119 receiving at different times communications therefrom, to which he replied ; that whilst off San Blas the captain showed no American ensign,

but after receiving the communications from the shore, he ordered the chief mate not to head the log-book, and also directed the concealment of the ship's name by covering her stern with painted canvas, and proceeded along the coast as far as 188 north, looking for some bay or inlet on the coast of Mexico where the cargo might be delivered; but finding no suitable place, the ship was headed for San José, California. It is further proved by the witnesses, Mesroon and Bell, that The Admittance entered the port of San José before it was captured by the forces of the United States, and when it was still a Mexican port, in the possession of the enemies of the United States; and the witnesses, Bell and Graves, both of the crew of The Admittance, swear that the captain, before the seizure, landed goods at this hostile port. Upon every correct view, then, of the facts of this case, and of the law of prize as applicable to these facts, it is clear that the ship Admittance was properly subject to seizure and condemnation as prize of war.

We have seen, by the authorities cited, that intercourse with the enemy is sufficient cause for personal punishment, and for the confiscation of property; that it is a cause originating in, and inflexibly enforced by necessity for guarding the public safety. In this cause are established against the claimants of this vessel, not only intercourse, but trading, in its common acceptation. Moreover, it is a settled principle, that if the owners had not anticipated a violation of the public law, the fate of their vessel, with respect to an infraction of that law, must depend upon the conduct of the agent with whom they have entrusted its management.

With respect to the respondents, Jecker, Torre, and Co., and Quintana, claimants of the cargo, the written documents found on board the captured vessel, and surrendered to the libellant by the master, fasten upon these claimants not only a knowledge of the design, under the pretext of a voyage to the Sandwich Islands, of trading with citizens of the United States, a belligerent nation, but they fix upon those parties strenuous and active efforts to possess themselves of the fruits of that traffic—the cargo of the ship; and to obtain them, not even by the circuitous voyage to Honolulu, but by direct transit to and within the territory of the enemy's nation. It is a circumstance of much significance disclosed by these papers, that there appears to have existed a perfect understanding and preconcert between these claimants, the charterers of the vessel, and the master. The arrival of the master is anticipated and waited for, and no | sooner does his vessel appear on the Mexican p. 120
coast, (the war still continuing,) than she is boarded from the shore by the agents of the claimants, bringing assurances of arrangements made for the violation of the law of war, and of the safety with which that violation might be accomplished.

Thus, on the 12th of February, 1847, a letter, from which the following

extracts are taken, was addressed by the agent of the claimants, Jecker, Torre, and Co., Louis Rivas Gongora, to the master of The Admittance :—

'CAPT. P. PETERSON, Ship Admittance, off San Blas.

'SIR : I have been informed of your sailing from New Orleans with a cargo of cotton to my consignment, and have also received a copy of Messrs. Wylie and Ygana's instructions for your guidance ; also a copy of your charter-party. But as it will be more for the convenience of all parties concerned, that in case of your not being allowed by the blockading vessels to enter San Blas or Manzanilla, you should not proceed to the Sandwich Islands, which are very distant, but in the first place to San José near Cape San Lucas, which is in possession of the Americans, I have to request that if you find the port of San Blas blockaded, and should be warned off, you will, as is directed in your instructions, proceed to Manzanilla, where, if you are allowed to enter, you will find an agent meeting you there, who will receive your cargo. If San Blas is open when you arrive, you will come into the bay immediately and anchor, putting yourself under the orders of Don Eustaquio Pasiere, who will proceed to discharge your cargo ; and as it is of much importance that the cotton should be on shore as soon as possible, I hope you will do every thing on your part to commence and to finish discharging with the least possible delay. If you are permitted to enter San Blas or Manzanilla, you must come in under British colors, the name of the vessel and your own remaining without alteration, still reporting yourself from New Orleans ; but you will be careful not to deliver any of the papers of the ship or cargo to any one except to Don Eustaquio Pasiere.'

Again, on the 27th of the same month, this person thus addresses the master from Tepic :—

'CAPT. P. PETERSON, Ship Admittance, off San Blas.

'SIR : I had the pleasure to write to you on the 12th of this month, which will be delivered to you along with this. But as at present certain circumstances have taken place which, I think, make it too dangerous for you to come into San Blas, I have to request that you will proceed
p. 121 immediately to Manzanilla, and | put yourself under the orders of Don Manuel de la Quintana, who has gone to meet you there, and who will deliver to you a letter, authorizing him to act as your consignee. He will discharge your vessel, pay your freight, and transact all the business of your vessel the same as if I was present. You will please enter Manzanilla under English colors, and, as the war continues, you will take care that it shall not be known that your vessel is American.'

In proof of the agency of Rivas, as the representative of Jecker, Torre, and Co., and as affecting them by his acts, reference may be made to a communication from that firm, dated Mazatlan, April 1, 1847,

addressed to the master of The Admittance, which communication was doubtless prepared on entire ignorance of the seizure of that vessel, which had occurred only three days previously at San José. In this communication it is said: 'Should this find you at San José, we have to request you to proceed at once to San Blas, referring you at the same time to the accompanying letter for you from Don Luis Rivas de Gongora, of Tepic. Mr. Rivas has furnished us with copies of your letters to him, of the dates of the 3d and 4th of March, by which it appears you entertain fears of being seized by an English or American cruiser should you follow his recommendation to discharge under English colors.' They then refer the master to Mr. Mott and Mr. Bolton, for assurances that his apprehensions are groundless, and state, 'that in less than a month previously an American vessel discharged at San Blas without let or hindrance; that the difficulty with regard to the vessel in a Mexican port had been overcome by an order of the supreme government, by which vessels of any nation were permitted to enter, provided that the captain would make a declaration to the effect that he belonged to a friendly or neutral nation, no papers confirming that assertion being required of him.'

We think, then, that by the evidence found in the possession of the master of The Admittance, there is shown a complicity in all the respondents in premeditating, and as far as they had power in executing, a scheme for effecting intercourse and trade with the open enemies of the United States—an offence such as rendered all the means and instruments for the accomplishment of such a scheme lawful prize of war.

But it has been insisted, that should it be conceded that there existed originally sufficient grounds for capture and condemnation, still, the captor had forfeited all right of prize by omitting to send the vessel and cargo to the United States for adjudication, and by selling them without the justification of necessity in a foreign country. The libellant has alleged, in justification | of the disposition of the vessel and cargo, p. 122
'that he was at the time of the capture of The Admittance at a great distance from the United States, and, without weakening inconveniently the force under his command in his own ship, he could not have spared a sufficient prize crew and officers to command the captured ship, and to bring her into the United States.'

The exception here taken brings up the inquiry, as to the duty and power of a captor to send in his prize for adjudication, and as to the discretion vested in him in deciding upon the extent of that duty, and the feasibility of that power under existing circumstances. This inquiry has been treated with so much force and perspicuity by Mr. Justice Curtis, in a case adjudged by him between a portion of these respondents

as claimants of the ship, and the libellants, that it cannot be more clearly and at the same time more succinctly elucidated than it will be by reference to the opinion of that judge in the case alluded to, (*vide* Fay et al. *v.* Montgomery, 1 Curtis's R. 266.) In that case, the judge remarks : 'The grounds on which restitution is claimed are thus stated in the libel, "that the seizure and detention were without any legal, justifiable, reasonable, or probable cause ; and even if there had been probable cause for the seizure of the said vessel, the said Montgomery was legally bound to send the same to the United States for trial, which might easily have been done, but which the said Montgomery illegally and unjustifiably omitted to do, and thereby illegally converted the same to his own use." Here (says the judge) are two distinct grounds : the first being that the seizure was an act of illegal violence ; and the second, that, by not sending the vessel to the United States for trial, the respondent had illegally converted it to his own use.' After commenting upon the evidence which led his mind to the conclusion that there was properly a question of prize to be tried, the judge remarks : 'And this brings me to consider the other ground stated in the libel, that by his omission to send the vessel to the United States for trial, the respondent illegally converted the vessel to his own use. That captors may so act towards prize property as to forfeit their rights as captors, and render themselves liable to make restitution, with or without damages, is clear. But before the court can so declare, a case of forfeiture of rights, free from all reasonable doubt, must be made out. In considering this part of the case, the question is, whether the allegation that the respondent omitted to send the vessel to the United States for trial, when he could safely and properly have done so, and thereby illegally converted the property to his own use, is made out in proof.' The answer of the respondent to this part of the libel states : 'That it was impossible for him, consistently
p. 123 with the public interests committed to his direction, | to have sent the ship Admittance to any port of the United States.' The judge proceeds to say : 'Before considering the facts upon which the forfeiture is asserted, one principle should be stated, which is entitled to an important effect on this part of the case. It is, that an honest exercise of discretion, necessarily arising out of his command, cannot be treated as such misconduct in the commander of a public ship of war, as will forfeit his fair title, and render him liable to be treated as a trespasser. This principle is too obviously just to require the support of authority ; but it will be found to have been laid down and applied in the case of Dinsman *v.* Wilkes, in 12 How. 390.

'Now it must be admitted, that the question whether the necessities of the public service will allow the commander of a ship of war, in time of war, upon a remote station on the other side of the globe, to spare

one of his officers to go home in command of a prize, is one depending on his discretion, necessarily arising out of his command. In the first instance, he alone has the power to decide the question—he alone has the needful knowledge of facts, and he is bound to exercise his judgment upon them. Certainly his judgment is not conclusive—good faith and reasonable discretion are requisite ; but it would not only be a hardship, but injustice, to impose on the commander the duty of determining such a question, and, when he has determined it, to attribute to him as an act of misconduct that he did not come to a different conclusion. It is true, that it is a clear duty of a commander to send in his prize for adjudication, but this is not an absolute obligation. It depends on his ability to perform it ; and of this, as already said, he must judge in the first instance ; and if he decides with reasonable discretion and an honest purpose to do his duty, I cannot consider him as guilty of misconduct which works a forfeiture.'

The judge then, after an examination of the proofs in the case, and of the law as above expounded by him, comes to the following conclusion : ' Keeping these principles in view, I am not satisfied that, in omitting to send the vessel to the United States, Captain Montgomery violated any known duty, or acted with so little discretion as to render him liable as a trespasser.' And he closes his review of the evidence with this very forcible view of its just import and character : ' One of the lieutenants of The Portsmouth was serving on shore—two only remained ; and it does not appear that a single passed-midshipman was on board. Lieutenant Revere [one of the remaining lieutenants on board] has given an opinion—no doubt an honest one—that he might have been spared ; but it is an opinion formed under no responsibility of command ; and I am not prepared to say that a sloop of war on that coast, at that time, officered by only | two lieutenants, ought to have been left with only one, p. 124
in order to send home a prize—and still less, that the commander erred so grossly, in not detaching this officer on such service, as to forfeit his legal rights thereby.'

The facts which are applicable to this part of the case now before us, are essentially, if not literally, those adduced in the trial before the judge whose opinion has been just quoted ; and the very clear exposition of those facts, with the legal deductions from them, as set forth in that opinion, command our entire approbation, and are regarded as conclusive against the appellants upon the question of forfeiture by the appellee of his right of prize.

Another exception urged in the argument as fatal to the decree of the circuit court demands our notice, and it is this : That the proceedings instituted in the district court for the condemnation of the vessel and cargo as prize of war were in the name of the libellant, the captor, whereas

they should have been commenced and prosecuted in the name of the United States. This irregularity, for such it must be admitted to be, may have proceeded from a misapprehension of the opinion of this court in the case of Jecker, Torre and Co. *v.* Montgomery ; (see 13 How. 498 ;) in which opinion it is stated to be the duty of the district court to order the captor to institute proceedings in that court for the condemnation of the property as prize of war, by a certain day to be named by the court. The exception thus urged is not raised in the answers or in any other form of pleading in the court below. The parties have gone to trial upon allegations connected with the merits, and upon such testimony as they have chosen to introduce. It would seem to be a sufficient answer to this exception to say, that after its waiver or after an omission to urge it in the court below, and after going into an extended range of testimony as applicable to the merits of the case, to permit an exception entirely distinct from the merits, in the appellate court, would be extending an improper license to the party starting such exception, and might be productive of injustice to his opponent. The exception is unquestionably technical or formal. It embraces neither the question of power of the captor to seize, nor that of the character of the subjects of capture as lawful prize of war. Moreover, this exception, if allowable, would seem to have no other object or purpose, but that of securing the ends which the proceedings and decree of the court have in fact accomplished ; for it is seen that the libel, though filed in the name of the captor, was founded upon the public authority of the United States, and the decree pronounced in the case is in favor and in the name of the government, by whom it
p. 125 is shown the proceeds of the condemned | subject have been actually received. It is plain, therefore, that every purpose which the most formal proceeding could have effected, and nothing beyond this, has been accomplished by the decree in this case ; and the proposal now pressed upon the court is, that in virtue of a formal exception, which either has been waived or omitted in the proper time and place, the merits of this controversy voluntarily submitted, and fully examined, should be entirely lost sight of, and that the party who alone, within the purview of the exception itself, could regularly claim the subject of the controversy, should for the mere form be required to surrender that subject. Such a proposal should be regarded as neither equitable nor reasonable, and should be especially discountenanced by a tribunal which acts upon principles of an enlarged public policy—less fettered perhaps than any other by narrow technical rules.

This case bears a strong resemblance to that of Benton *v.* Woolsey and the Bank of Utica, reported in 12 Pet. 27, in which the district attorney of the United States filed an information in his own name, in behalf of the United States, in the district court for the northern district

of New York, to enforce a mortgage given to the United States by Woolsey one of the defendants. This court in that case held this doctrine: 'Some doubts were at first entertained by the court whether this proceeding could be sustained in the form adopted by the district court. It is a bill of information and complaint in the name of the district attorney, in behalf of the United States. But on carefully examining the bill, it appears to be in substance a proceeding by the United States, although in form it is in the name of the officer; and we find that this form of proceeding in such cases has been for a long time used without objection in the courts of the United States held in New York, and was doubtless borrowed from analogous cases in the courts of the State where the State was plaintiff in the suit. No objection has been made to it either in the court below or in this court, and we think that the United States may be considered as the real party, although in its form it is the complaint of the district attorney.'

The objection which has been made to the deposit in the treasury of the money arising from the sale of the captured property in this case, appears to be without weight. Since the act of congress of the 3d of March, 1849, it appears to be the intention and the positive mandate of congress, that all prize money arising from captures by vessels of the navy of the United States, whether received by marshals for the sale of prizes, or in the hands of prize agents, should be deposited in the treasury of the United States. *Vide* § 8th of the act, Stats. at | Large, vol. ix. p. 126 p. 378. It does not clearly appear in whose hands the proceeds of the sale of The Admittance and her cargo were at the date of the above statute. But if they were in the possession of Captain Montgomery at or after that time, either as captor or prize-master, or whether they were in the hands of any other person, it was within the scope and objects of the law to place the proceeds of the prize sale in the treasury of the United States; and accordingly it is shown by the certificate of the treasurer of the United States, that the sum of sixty-seven thousand dollars, as the proceeds of the sale of The Admittance, were on the 26th of December, 1849, by William Speiden, purser of the navy of the United States, deposited in the treasury of the United States.

Upon a consideration of the facts and the law of this case, we are of the opinion that the decree of the circuit court be affirmed.